IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRAD RAFFENSPERGER, ET AL.,	:	
	:	
DEFENDANTS.	:	

TRANSCRIPT OF ORAL ARGUMENTS ON MOTION FOR SUMMARY JUDGMENT

PROCEEDINGS

BEFORE THE HONORABLE AMY TOTENBERG

UNITED STATES DISTRICT SENIOR JUDGE

MAY 2, 2023

1:10 P.M.

MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED TRANSCRIPT PRODUCED BY:

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; May 2, 2023.)

THE COURT: Please have a seat.

Good afternoon. We're here for oral arguments in Curling, et al., v. Raffensperger, et al. This is Case 1:17-CV-2989.

As always, we have a host of counsel. But I might as well get you for the record to introduce yourselves.

Go ahead.

MR. CROSS: Sure. David Cross of Morrison Foerster on behalf of Curling plaintiffs, Your Honor.

MS. SWANBECK: Sonja Swanbeck from Morrison Foerster for the Curling plaintiffs, Your Honor.

MS. MIDDLETON: Caroline Middleton for the Curling plaintiffs, Your Honor.

MR. SPARKS: Adams Sparks, Krevolin & Horst, for the Curling plaintiffs. Good afternoon, Your Honor.

MR. KNAPP: Halsey Knapp, Krevolin & Horst, on behalf of the Curling plaintiffs. Good morning or good afternoon, I guess.

THE COURT: Good morning, good afternoon, and all of that.

MR. KNAPP: It has been a long day already.

MR. McGUIRE: Robert McGuire for the Coalition plaintiffs, Your Honor.

MR. BROWN: Bruce Brown for the Coalition plaintiffs.

MR. LOWMAN: David Lowman for Fulton County. And with me is Kaye Burwell.

MR. TYSON: And good afternoon, Your Honor. Bryan Tyson for State defendants.

And if it is okay with you, I'll just kind of run through everybody.

THE COURT: Yes.

MR. TYSON: Carey Miller from Robbins; Vincent Russo, Robbins Firm as well; Josh Belinfante.

THE COURT: Wait a second. I'm just -- I --

MR. TYSON: I'm sorry. Mr. Miller, Mr. Russo, Mr. Belinfante. And then Mr. Pico-Prats from the Robbins Firm.

THE COURT: I'm sorry. Can you stand up so I can see you? All right.

MR. TYSON: Bryan Jacoutot from our firm is here. He had to step out briefly. Diane LaRoss also from Taylor English. Frank Strickland from Taylor English as well came to observe. And Alex Denton from Robbins as well.

THE COURT: Okay. Wonderful. Thank you very much.

MR. ICHTER: Cary Ichter as well on behalf of certain of the Coalition, et als.

THE COURT: All right. Very good. Thank you very much. Just a few preliminary matters.

(There was a brief pause in the proceedings.)

THE COURT: Just so I don't forget this housekeeping matter, I would appreciate if the Curling plaintiffs would do the same as the State of Georgia and Coalition did in giving us an identification of its exhibits. We have -- basically you-all had more exhibits, and you did them Exhibit 1, 2, 3, 4, 5. And it would be very helpful if we could get a chart that said what each document was.

And if you could put it on the docket, that way then we'll be able to more easily find it. I'm not going to say file everything again. But at least we'll have the correspondence. And if we go further in this case, do that anew.

A few just sort of other matters. Where is the State on the GBI investigation?

MR. TYSON: So, Your Honor, I'll begin. If Mr. Miller or Mr. Russo has anything to add, they are welcome to do that.

Our understanding of the state of the GBI investigation is it remains ongoing. The GBI is not providing regular updates to the Secretary or the SEB, as we understand it, because it is a pending criminal matter. And that is as much as we know at this point.

THE COURT: Have you been given any information as to an anticipated date for wrapping up the investigation?

MR. TYSON: We have not, Your Honor. And the

Secretary's office, I know, has inquired of that and has not been given that information either.

THE COURT: Okay. Has the Secretary of State's office implemented CISA's recommendations as to the adjustments in the BMD system?

MR. TYSON: And, Your Honor, where that stands is Mr. Sterling testified, I believe, at his 30(b)(6) deposition about the physical security elements are largely in place. The other recommendations from CISA related to kind of the operations of the Dominion software itself. Dominion had approved by the EAC in late March about six weeks ago a new version of its software that addresses the various software components of the CISA recommendations.

We have spent hours with the technical staff in the Secretary's office, hearing from folks with Dominion. The way that that process -- a couple of pieces about that upgrade for the Court to be aware.

One is no jurisdiction has yet installed that upgrade as of yet. It has not been used in any election yet. Unlike the changes that had to be made in late 2020 right before the election, the upgrade process is a very intensive multistep process that involves multiple pieces of media, multiple components, and it involves touching every piece of the election system.

So every ballot-marking device has to have three

different pieces of media installed on it to complete the upgrade. Every precinct scanner has to be upgraded. Every central count scanner has to be upgraded. And every election management server also has to either be replaced or upgraded. So the implementation process for doing that is very involved.

Also, once a county begins that process, they can't go back. So once you complete upgrading part of your equipment to 5.17, there is then now no ability for that system to talk to the 5.5 system that was used before.

So where things stand at the moment is the Secretary's office is still in the process of developing an implementation plan, of getting that, touching all the components of the system to do that upgrade. But given the scale and the scope of that, there is a Dominion component of Dominion doing part of that work, the Secretary's office doing part of that work.

So as of now, that is all in development. But at this point, there is not a timeline. Given the scope of what is necessary, they don't anticipate that being completed this year. It likely will be a 2025 type of upgrade, given all that is involved and the election schedule in 2024.

THE COURT: Okay. So it won't be done for the 2024 election?

MR. TYSON: That's correct, Your Honor.

THE COURT: And just -- I know that CISA had its

recommendations, but I just want to make sure I understand.

Is it what you are telling me is that in order to implement those recommendations they need -- there needed to be a wholesale upgrade in the system?

MR. TYSON: So yes, Your Honor. Yes and no, I guess. So in part, some of the CISA recommendations related to physical security. Those don't require a software upgrade. But for the components --

THE COURT: Physical security surrounding the machine or in -- or the way the -- or kind of changes in the way that the machine is positioned in a voting area?

MR. TYSON: It is more just making sure the sealing is in place, who has access to it, how that access is controlled, those types of basic physical security things.

The remainder of the recommendations there related to the operation of the software. And it is things like that you can't do an installation or launching another application on the ballot-marking device itself. So that requires an update to components of the system as to how the ballot-marking device boots up. So that is an example of a recommendation CISA made, not allowing other applications to be launchable, that requires a software change to do that.

That is the thing that just got approved by the EAC, I think it was, late March or early April. So relatively recently when that took place.

THE COURT: When you say not any other applications be launchable, do you mean in that particular -- the server there or do you mean on the -- I'm just -- you know, there are so many different parts of the computer system. And we have heard a lot of testimony in the 2020 hearing about, you know -- in one or more counties about the main server having lots of other programs, games, games that came from other countries that could be launched and could be -- and have -- could have anything on them potentially.

Is that what you're talking -- what are we talking about, just to be sure I understand?

MR. TYSON: Yes. So I'm not talking about that specifically.

The CISA recommendations obviously emerged from Dr. Halderman's report about the ballot-marking device itself. So in terms of that, it primarily relates to -- the software upgrade primarily relates to what the ballot-marking device is capable of doing and not doing with its software.

But as part of that process, you also have to upgrade all the other components of the system, which would include the election management server. As part of that process, I don't know that that was a specifically included -- I'm working off memory of CISA recommendations. But I don't know that the server was specifically included in those recommendations. But it would be included in an update to the software system for

5.17, which is the new version from Dominion.

THE COURT: Well, as long as we're talking about an upgrade, I hadn't planned to ask you at this point, but I'm just going to get some of the basic fact developments that I -- information out there.

So as other states, including Colorado, have a system where they do not rely on QR codes but are otherwise comparable BMD systems and just simply you vote and it produces -- the vote is captured without going through the QR interface.

Has that been under discussion for 2025?

MR. TYSON: For 2025, not yet, Your Honor. There are a couple of reasons. I can give some context for why.

So I believe the Colorado system is not yet fully -- what you are referring to is what is called a full-face ballot, where instead of printing a QR code with a list of candidates, it prints out what looks like an absentee ballot with the bubbles filled in by the computer of what is there.

I believe Colorado's system has not yet been implemented. I think that is what they were trying to move to. I don't understand that it has been implemented. I'm not sure there is anything in the record on that.

I know when the announcement was made a year or two ago it was that they were looking to move to that kind of system as soon as it was certified.

The challenges for us in Georgia moving to a

full-face ballot is it would require both the software upgrade to the 5.17 version of the Dominion system -- that would be kind of part one. But part two is Georgia uses an 18-inch ballot for its ballots for a full-face-sized ballot. The current printers that are in use with the Dominion BMDs will only handle an 11-inch or 14-inch-sized printer paper.

And so if we were going to move to a full-face ballot system, it would require converting basically or actually replacing all the printers for the ballot-marking devices to be able to do that.

The other challenge with a full-face ballot is it is a longer ballot. And so instead of being all in an 8-1/2-by-11 sheet of paper, you have possibly the double-sided ballots. So the scanning gets more complex. Or multiple pages. Where like in Gwinnett County, for example, that were required to be bilingual ballots, there could be multiple pages. Then if a voter has to scan multiple pages in, that introduces challenges on the audit side other issues.

Those are all things that are being looked at. But I think the baseline piece is, even if we move to that, the scanners still function exactly the same, which it looks for a point on the ballot itself, just like it does with a QR code, just like it does with a hand-marked ballot.

So at the end of the day, the scanner operates the same. The difference is all together pieces that have to go to

moving to that full-face ballot system.

THE COURT: Well, it may work the same. But obviously there was significant testimony at least from Dr. Halderman in the 2020 hearing about how QR codes provide a whole other avenue of potential hacking or alteration of results.

MR. TYSON: And, Your Honor --

THE COURT: And I thought -- let me just ask you this question.

My recollection of Dominion's initial bid that it provided to the State was that they gave you -- the State various options, including having a full -- what you're talking about now? I mean, basically a full printout model that you would see, that you weren't relying on the QR code.

Am I just misremembering that?

MR. TYSON: Your Honor, my recollection of what Dominion was offering at the point was they didn't yet have an EAC-certified system that would do a full-face ballot in the 2020 cycle when we were working through that. And the initial contract said if they later get an EAC-approved full-face ballot, that would be offered to Georgia.

So where that stands now is that is 5.17. 5.17 is EAC-approved. It will generate a full-face ballot. The challenge is the printers that we have will not be able to generate that.

I think one other piece Mr. Miller was going to talk about but I'll just kind of preview is I don't think there is anything in the record and even the testimony from Dr. Stark and others that moving to a full-face ballot would resolve the plaintiffs' claims. So I think their claims about verifiability and the other issues they raise are the same with that, either a little bit less so than with the QR code. But I think the evidence would show that there is nothing that would actually resolve their claims if we moved to that kind of model.

THE COURT: All right. Well, of course, plaintiffs can address that while you are speaking. I guess the thing that I thought was noteworthy was there was all this -- there was significant testimony in the past about, if you get your printout from the current system, all you have is sort of a hanging name or a hanging yes-or-no on a proposition and you don't have the proposition addressed. And this is, particularly as you go down the ballot, very hard to remember. You may remember who you are going to vote for for Governor. But after that, it can go blurry.

And we all have had the experience of probably having friends and colleagues saying, who is running for county commissioner? Who is running for -- who are you voting for for that? Even for lieutenant governor. I mean, anything other than the Governor and the President, people not really

remembering what they were -- where they were going necessarily and was that the name or was it not the name.

So that is -- and so the whole notion of proofing your ballot becomes harder when you don't have all of the information there.

All right. So that is what I thought the relevance of some of that was in terms of the plaintiffs' claims at least.

MR. TYSON: Thank you, Your Honor.

MR. CROSS: Your Honor, could I just address a couple of things?

THE COURT: Yes.

MR. CROSS: I totally understand why Your Honor is asking the questions you're asking. Those are important questions.

I do want to say though, just to preserve our record, none of what Mr. Tyson just said is in the record. So just for the sake of the decision Your Honor is going to have to make in the summary judgment motion, we would object to that being considered. They certainly had an opportunity to put in any of the things that he wanted to represent. And I will say also -- we'll talk more about this.

But Mr. Sterling's testimony was a bit of different from Mr. Tyson described. I recall asking him whether any of the CISA implementations -- mitigations had been implemented.

And his answer as I recall was he didn't know. And he was a representative of the State.

And Mr. Tyson points out that they have physical protective measures at least. We just learned yesterday -- Your Honor may have read -- that a number of e-pollbooks were stolen from a county. So we are still in a position where the system is evidently not secure.

The last two points on this, Your Honor, briefly. The point about moving to full-face ballots, again that is also not in their briefing. They actually -- and I confirmed this last night. They don't make any feasibility argument at all.

You might remember in the PI context that was a key focus was sort of the cost and burden of moving to a new system. That is not any interest that they offer at this stage of the case. They have very specific interests that they allege justify what they are doing. They do not argue feasibility or any burden or expense to switch -- to implement anything that we're asking.

Lastly, Your Honor, while Mr. Tyson is right that eliminating a QR code will not give us the full scope of the relief we're asking for, it is certainly a critical component of the relief we're asking for. So if that is all we got -- certainly we hope it is not. We think we're entitled to more -- but that is part of the relief that we're asking for. And I wanted to make that clear.

Thank you, Your Honor.

THE COURT: All right. Well, I definitely note your concern that the conversation and the information provided are not in the record. You are living and breathing this case. And also counsel for the State is living and breathing other dimensions of it practical. And as a reality that I have had to live with it a long time too but not with that intensity.

These were just things that I wanted to understand in terms of the landscape of the case here.

MR. CROSS: Totally understand, Your Honor.

THE COURT: All right. So -- but I do understand that, to the extent it is not in the record, it is not in the record.

So I know we gave you a laundry list and beyond of issues and matters that had been raised. And basically we were trying to do this to frame the conversation because these were all the sorts of issues that you had raised. And just for those who are in the audience, this was a multipage set of questions and -- that counsel did not receive until yesterday. But they have been busy working. So I don't think this is anything new to them.

I just simply posed the questions. You don't have to go through each of these questions. That is not the anticipation. The anticipation was simply that we all be on the same wave level so as to, you know, what some of the

matters are that have been presented that the Court is cognizant of and that we want to all grapple with today.

So do not feel like you have to touch every one of these issues. And you can apportion your time as you see fit. And at some point, we'll take a break and we'll figure out is there something that we really missed.

But as the plaintiffs bear the burden of proof, I'm going to let them go first. But tell me what you are thinking about time and how you want to proceed and rebuttal to the argument provided by the defendants.

MR. CROSS: Sure, Your Honor. So what we were planning to do today was I was going to start just briefly on a couple of key sort of macro points. I was going to hand it to my colleague, Sonja Swanbeck, who will address standing for the Curling plaintiffs. My colleague, Ms. Middleton, is prepared to address some evidentiary issues. One of which you have in your order. I think it is Question 12 about the MITRE report. And then Mr. McGuire -- sorry. Then I will get back up at some point to address the merits.

I have a question for you on that, which we'll come back to. And then Mr. McGuire and Mr. Brown will address the issues for the Coalition plaintiffs.

The one question I had for you procedurally was: Is it more helpful to Your Honor to hear argument from both sides on standing and then go to merits or to do it altogether?

THE COURT: Given the way my brain works these days -- I mean, obviously there is interface between standing and the actual evidence. So that is fine.

How do you feel about that?

MR. TYSON: Your Honor, that makes sense. We actually kind of divided our argument the same way that we were going to handle standing as an issue -- I was going to handle. Mr. Miller would address the merits piece. So we had thought of it as kind of a divided piece anyway.

We're happy to proceed however works for you. I think just our only request is since it is our motion we have the chance to kind of close when we're all said and done. But I think that's our only request in terms of --

THE COURT: That is fine. It is your motion. So you are welcome to go first actually. I was not thinking about that. So --

MR. CROSS: We were assuming they would go first since it is their motion. But whatever Your Honor prefers.

THE COURT: That is fine. It is your motion. I'm just in a trial mode since that is what I have been recently -- more recently up to. So --

MR. TYSON: If it is all right with Your Honor, we'll begin with standing. Then do you want me to conclude standing and move to standing for the plaintiffs to respond to that point?

THE COURT: That is right. That is right.

MR. TYSON: We can do that. All right.

So we do appreciate the questions. We had planned to answer, I told Mr. Martin, about maybe half of them already. But the others we want to make sure we address. So we have tried to work those in to address them as we go.

Let me get myself connected here.

Thank you, Your Honor. Again, Bryan Tyson for the State defendants.

So, obviously, I know as you have mentioned already we have been here for a while on this case. A lot has transpired since we started with the Congressional election in 2017. But I think it is important to emphasize, as we get started today, that we're at a motion for summary judgment. It is now time for the plaintiffs to come forward with admissible evidence if there are any issues remaining for trial. And as you see from both of our motions, we submit there aren't any issues remaining for trial.

So this is, again, I think one of the things that is also important to recognize -- I know this Court is aware -- is, as best I can tell, this is the only case that is still kind of hanging out there in terms of questions about the voting machines and other issues related to that. All the others uniformly nationwide have been dismissed on standing issues.

And so getting into those issues is obviously very important for us to work through that. And obviously those cases were dismissed at a far more deferential standard than what the plaintiffs have today. So I'm going to walk through just the various jurisdictional pieces beginning with mootness. And I know we have had a lot of conversation about mootness and the DRE claims.

But I thought it would be just good for us to begin just to sort of focus in on what is still pending in the case. From the Coalition plaintiffs' third amended complaint, we have a fundamental right to vote count and we have an equal protection count.

And for the third amended complaint, it relates to voting on the AccuVote DREs, relates to those who vote on the AccuVote DRES are going to be treated differently than other similarly situated electors. So these are all claims about DREs. And, again, no Georgia voter has voted on a DRE in at least a statewide election for at least three years.

Curling plaintiffs have similar claims, fundamental right to vote claim in their third amended complaint, under First and Fourteenth Amendment due process and equal protection. Again, there are questions about the system and the burden on the right to vote as to the DRE system.

And as you have seen in our briefing, we believe the Court really focused on the mootness of the case in terms of

these claims. I think that the individual counts at least have to be moot because we're at a point where the DREs are decertified. They can't be reused in Georgia. We have distributed BMDs to all counties following House Bill 316. Used those in several elections.

So not only is there nothing further the Court can order related to the DRE claims specifically, but also there is no longer any redressability for purposes of standing because the Court can't order any relief as to DREs.

And I think the questions from the Court indicate that if there is a question about something that comes over from the DRE system into the new system, which we would submit that is not really an issue, but that is what the evidence is here -- we have to look at that in context of the BMD claims. It is not a stand-alone claim as to the DREs. That is a claim as to the BMDs themselves. So I just wanted to address that issue at the outset.

Next issue I think that is important here, because we're already starting in the separation of the two counts and the two complaints, is the issue of whether one plaintiff is enough. I think that the *Town of Chester* case that we cite makes very clear you have got to have standing for each claim and each form of relief.

So what we have in this case is not just disagreements over case strategy and not just different

attorneys. We have different complaints that are seeking different, even if sometimes overlapping, relief. We have different strategy. We have different experts and witnesses.

And then as the Court flagged in its question, that also goes to the issue of attorneys' fees. So I don't think it is enough -- and I'll talk about the Coalition for Good Governance and organizational standing in a few minutes. But it is not going to be enough to just say the Coalition has diversion of resources standing, and therefore everyone else who is here is good.

We would submit that given the requirements of *Town of Chester* this Court should dismiss any plaintiff in this case that does not have standing at this point instead of relying on the single plaintiff rule.

It also is important to note that the single plaintiff rule is one of those issues that from a judicial efficiency standpoint is why it exists. And here it doesn't make sense to have this case continue on all these different fronts if there is not a plaintiff that can carry that forward.

Also I wanted to just touch on at this point why we believe the Eleventh Circuit's language about standing in the appeal from the preliminary injunction orders as to the Coalition is not dispositive.

The Eleventh Circuit obviously in that case was reviewing the entry of a preliminary injunction. And they only

found that the Coalition had credibly made the assertion -- the assertion that they diverted resources. That was before we had a 30(b)(6) of the Coalition. That was before we had a lot of the discovery into standing.

We're now at a point in the case where that is no longer a dispositive issue because the Court has to -- the plaintiffs can't rely on their allegations any more or rely on their declarations. They have to have evidence -- admissible evidence at this stage in order to show that this Court has jurisdiction. And as we'll talk about, we submit they do not.

So moving to the BMD claims that are at issue here, Coalition plaintiffs have these in their first supplemental complaint, as the Court has noted, an additional Count 1 and 2. Claims about being unable to verify their vote due to a QR code. Having -- deprived of having RLAs. Deprived of a trustworthy and verifiable election process.

Their equal protection claims are treating voters differently because of the difference in mail-in voting and Dominion BMD votes that are cast in the case.

Similarly, we have the Curling plaintiffs in their Counts 3 and 4 of their third amended complaint focusing on similar issues. And we're going to talk a little bit more about what is the burden in a little bit. But I think one of our initial questions is --

THE COURT: Can you just go a little slower?

MR. TYSON: Certainly.

THE COURT: Thank you.

MR. TYSON: Sorry, Ms. Welch. I have so much to say.

THE COURT: It is not Ms. Welch. It is my brain. And you are very smooth. But maybe my mind doesn't work quite that quickly.

MR. TYSON: No problem, Your Honor.

So we'll talk a little bit about the burden. We also want to talk about what is the injury and what are the plaintiffs alleging as their injury in their complaints.

And there is a claim for the Curling plaintiffs about protection of the vote. Accurate counting of the vote is another issue in their third amended complaint and also the verification of the ballots. And we'll talk a little bit about whether verification is a claim, an injury or a burden, being asserted by the Curling plaintiffs or not.

But at this point, I think it is important to note that all of our state law claims are no longer in the case at this point. And so if the plaintiffs have an issue with state law issues, they have a remedy for that. They are able -- if there is a violation of state law they believe is occurring, they can go to superior court. They can ask for mandamus. They can ask for declaratory relief. They can get a judgment from a superior court on a violation of state law.

And what we've seen from the Georgia superior courts

is, when they are faced with a question about whether the BMD system complies with Georgia law, Fulton County Superior Court says, yes, it does. When faced with a question about ballot secrecy -- and we cited this earlier in the case in Sumter County Superior Court where the Coalition sued about that. It was a county issue. And there was no relief entitlement there.

So we can't bootstrap our state law violations into a federal violation at this point. The question for the Court now is, is there an injury, Number 1, to get us across standing. But then when we get to the merits, what is the burden and how do we categorize that burden on the right to vote?

So let's talk a little bit about the law on injuries. And I know the Court has already dialed into this question on a few points. The words concrete and particularized we're going to talk a lot about today and what is the difference in that from a generalized grievance. It obviously flows from the fact that this court is a court of limited jurisdiction.

So I wanted to start with *Reynolds* and *Gill* because the Court asked about those specifically. And we're currently litigating issues related to standing for redistricting cases in the redirecting cases in the three-judge panel case with Judge Grimberg and Judge Jones and Judge Branch.

In a redistricting context, which is what both *Reynolds* and *Gill* were, the injury to a voter is, I live in a

district, the district is configured in such a way that my vote is being diluted, so therefore that is my injury that I can bring forward as a claim.

That is different than a normal voting case. There is a lot of very specific things related to district cases. And so that is also where a large number of people in a district could share the same injury. Because everybody in a 50,000-person state house district may have their vote dilution claim.

But they still have something unique to them. And what *Gill* says very clearly is, you can't sue about districts you don't live in. You can't bring a claim against the entire state. You have to bring it just for your own injury.

So that is the major distinction between that case and the types of cases we're dealing with here. We don't have regional claims about the voting system. We don't have county-specific claims about the voting system. We have a general claim about the voting system statewide.

And so in terms of the injury, unlike a voter in *Reynolds v. Sims* or in the redistricting cases who lives in a particular district and says, this district is the problem, here we have an injury that is identical for all 10 million Georgians. Every single Georgian who is eligible to vote and is registered can bring the exact same claim. That's why this case is a generalized grievance instead of being more specific

and tailored like those redirecting cases were.

And that's what leads us to the *Wood* case. And I think it is important to recognize that Mr. Wood was trying to get the state to follow its law. That was part of what was the issue. But the main claim -- the main problem with Mr. Wood's claims post 2020 were that his claims were identical to every other Georgia voter. And that is what distinguishes this case versus a toxic tort case or a redistricting case.

In a toxic tort case or a redistricting case, yes, lots of people may share the same injury, but it is still individualized to them. But in this case, the injuries that are being alleged are common to every person, every voter in the State of Georgia. And so it has to be more narrow on that front.

So let me talk about the impact of *Tsao* and *Muransky*, which I know the Court has asked about as well.

THE COURT: Well, let me just say one thing -- ask you one thing about what you are arguing about Mr. Wood is that he still was arguing that he was injured because his vote was diluted because people were voting who weren't authorized to vote or were -- whether through an absentee ballot or some other reason.

But there was a specter of a lot of inappropriate -- unauthorized inappropriate voters. So it wasn't like he was in the same position as everybody else because he says, my vote

really was proper, and all these other people's votes weren't, and they have diluted my vote. And that's -- it is not just that we all have the same injury because he is saying there is a whole bunch of people who voted who shouldn't have voted and who the various counties allowed to vote who shouldn't -- who weren't really authorized to vote and who may have also stuffed ballots -- that there might have been stuffed ballots. And that is not exactly like everyone is in the same position because he has a sort of -- there is a conspiracy dimension that is the specter of his claims.

MR. TYSON: Yes, Your Honor. And I think it is important to remember that he made those allegations, and that wasn't enough. So the specter, I think, and the fear element is the big piece there.

Mr. Wood was afraid that this had happened. He thought he could prove this up. But even that allegation wasn't enough. And when we get into the Curling plaintiffs' and the Coalition plaintiffs' claims, I think what you will see is their claims are primarily we think maybe somebody might hack the system. It is very similar in terms of fear of what might happen that could affect their vote versus a specific vote dilution and a specific district like you have in *Gill* or in *Reynolds*.

So we think that is where --

THE COURT: Well, it is a different claim. But I'm

not sure I accept that they are running by fear because I think that they actually had a fair amount of a record to support that it wasn't mere fear. We wouldn't say if the -- when there were various counties in Georgia that had -- where the Russians were able to get people registered and voting that were not actually -- we don't say that is fear. I mean, there is a reality also of hacking or failure that can -- that is not just simply some specter that there is -- that was cast in Mr. Wood's case.

MR. TYSON: Well, Your Honor, I think that leads us very logically into *Tsao* and to *Muransky* and the data breach cases. Because I think it is important to remember that in those cases, there was a reality. Mr. Tsao, Dr. Muransky, they could both point to situations where, when credit card information was accessed, somebody's identity was stolen or there were improper purchases made on a credit card. They could point to data that showed that happened following a data breach.

But what is important in those cases is the Eleventh Circuit found that that still wasn't enough, an elevated risk of harm. Even when there had been that kind of harm in the past was not enough. And so I think, again, it is important to recognize, yes, Mr. Tsao took action by destroying the receipts, so did Mr. Muransky. And there was some steps taken. But that was ultimately the last on the list of items the

Eleventh Circuit considered about why there wasn't an elevated risk of harm that had been alleged in those cases.

I think in a lot of ways the plaintiffs would be better off from a strictly standing perspective if they alleged that hacking had occurred in an election, that an election outcome had been altered. I think that they -- maybe they don't get all the way there. But I think they get closer in terms of their injury than what they have alleged and what their evidence shows here. Because unlike Mr. Tsao and Dr. Muransky, they can't point to any situation where votes have actually been altered as a result of hacking in an election. They are not willing to say that the 2020 election was stolen or that the election results in Georgia were not correct.

Those are things Mr. Wood was willing to say. They are not willing to say that. And I understand why. But ultimately we're not even fully into the land of *Tsao* and *Muransky* because those cases had situations where there had been injuries from data breaches in the past. So it could be particularized to somebody.

But also those are situations where, kind of like the case here, we have access but no proof of malware or hacking. And so the various pieces of the data breach cases I think map very well on to this one because the ultimate issue is the plaintiffs have had the ability to review voting equipment in

Georgia extensively. They have had access to DREs that were used in Georgia elections. And Dr. Halderman testified there was no evidence of malware that he had found.

They have had access to GEMS databases that were actually used in elections. Dr. Halderman found no malware there. They have had access to Dominion ballot-marking devices. There are vulnerabilities. That is what Dr. Halderman found. No actual compromises.

We're going to talk, I'm assuming, today a lot about Coffee County. Plaintiffs have had access to what happened in Coffee County. And they have found access but no malware or other things that were installed that are part of the record in this court.

And so coming to our data breach piece, you have access, just like you had with the data breach in *Tsao* and *Muransky*, but you don't have the next step of that injury being particularized because it affected an election. And that is where there is a lack of injury for the individual plaintiffs in this part of the case.

So ultimately we're not even to the level, I would say, of what was alleged in those cases because we haven't even gotten beyond from access into any potential injury that would happen.

So for the individual --

THE COURT: Can I stop you for a second?

MR. TYSON: Certainly.

THE COURT: Do you-all have a paper version also of the -- of the slide show you are presenting here?

MR. TYSON: I apologize, Your Honor. Mr. Miller and I were discussing that right as we walked in. Neither of us printed our slides. We'll be happy to email them to the Court and anybody else afterwards. I apologize for that.

THE COURT: Thank you. That's all right.

MR. TYSON: Your Honor, let me then move -- that's our individual standing piece. I'll come back to one more component of that, which is for the Curling plaintiffs, as far as individual standing goes, what is the testimony. They do not vote on Dominion BMDs except for in a couple of isolated instances. They are all afraid of the Dominion system being unverifiable. Back to our fear question of what might happen.

They don't have any knowledge of manipulation of election results as a result of the Dominion BMDs. And what we've tried to do on the slide is just cite where the statement of -- our statement of facts was either undisputed or it was a statement -- a declaration from one of the plaintiffs that these are not disputed facts about this portion of the case.

Ms. Curling agrees that, like other systems, like a Dominion-based BMD system, hand-marked paper ballot systems have risks. And the Curling plaintiffs exercised their option to vote absentee, just as they are free to do to vote a

hand-marked paper ballot option.

Similarly for the Coalition plaintiffs, there is a couple that have voted on a BMD in a couple of isolated instances. They likewise have no knowledge of manipulation or hacking. As far as the individual plaintiffs go, we're not in a situation where they are able to allege a particularized harm as to any component of what is happening for them.

So in terms of the individual plaintiffs, we don't see that there is any sort of concrete and particularized injury, anything that distinguishes them from *Tsao* and Muransky.

Moving to the Coalition itself, the organizational plaintiff, *City of South Miami*, I think, is very instructive. I highlighted some pieces there. The members can only have standing as to anything an individual could allege. So even if there is issues, the Coalition admits they don't have a list of members. They are not aware of membership-related issues in terms of who their members are. But even if they had that, any member would only have the same injury that any of the individual plaintiffs would have. So there is nothing that would show they could have associational standing because they can't -- they would only stand in the shoes of their members.

And on the organizational standing side of the equation, I think the important piece that *South Miami* adds to the look at organizational standing is we don't see there is

any evidence of diversion of resources except to fund this litigation. And litigation expenses can't be a diversion.

But even if the Coalition had diverted resources, *City of South Miami* makes it clear that you can't divert resources because of something that is a speculative harm. So if the harm is speculative and the injury is not certainly impending as to the individual plaintiffs, then any diversion the Coalition made also can't be an injury because it is not certainly impending either.

In this case, you had a situation where these organizations in response to this Florida law had done all the things that the Coalition is saying it does here. They had educated their members. They had held workshops. They had done a variety of things. And the Eleventh Circuit said no, speculative harms are no more cognizable dressed up as an organizational injury than as an associational one.

THE COURT: Let me just say: I mean, I think that the setting and the legal posture of the *City of South Miami* is really different than these election cases and some of the other kind of comparable cases that you have relied on.

This is -- the court in *City of South Miami* really seems to be very focused on almost the lion's issues that we can't really -- to be pinning their claims to the unpredictability of either crime or misdeeds in law enforcement is way too broad.

And I mean, it has a whole other -- it seems like a very different posture. Let me just say that. And I'm not sure that it is reliable for that purpose -- for the purpose you are arguing.

I mean, I think that there are a lot of standing and challenging standing cases in the Eleventh Circuit. But I don't think that this sets a whole new standard because it is so critical of the core theory of the claims asserted here.

MR. TYSON: Your Honor, one thing I think that the Eleventh Circuit definitely criticizes the district court for in *City of South Miami* is drawing connections to disparate things. I think, as the court said in that case, everyone agrees racial profiling is an injury. There is no question about that.

I think clearly here too, if somebody's vote is not counted, if there was something particularized to an individual voter, maybe we would get to an injury on that. I think the issue for *City of South Miami* and the issue here is where is the intersection of the fear of racial profiling with an injury versus here where is the interception of a fear of hacking of the election system and an injury that results from that. So I --

THE COURT: I wouldn't say it is just a hacking of it. It is really the function -- the fact is there is hacking and then there's manipulation within that.

MR. TYSON: Certainly.

THE COURT: So -- and I don't -- though I don't -- though I think that there is racial profiling and there probably was -- I haven't looked at the record in this case. But it seemed to me still that the circuit court seemed just very suspicious of the entire theory of the case.

And maybe there is plenty of reason to be suspicious here as well. But the plaintiffs have presented a body of significant expert evidence. And we do have also a peculiar circumstance where the software for Dominion was put on the web.

MR. TYSON: Your Honor, I think that your distinction of hacking and manipulation is an important one because I would categorize it as access and manipulation. So can somebody get access to the system is one question. Have they done harm with that access is something else.

And I think that kind of throws us back to *Tsao* and *Muransky*. Data breaches are access. Somebody got access to someone's personal information. Did they do anything with that is a different question. So I think we would be looking at the same issues here in terms of the evidence at this stage.

Let me just talk briefly about traceability. The Court had asked us about the acts and omissions of the State defendants, that if something were -- if the State defendants took action that made the system vulnerable to hacking, can you

get traceability to the State defendants or is there kind of a cutoff in the causal chain there.

And I think that there is a -- there is kind of two ways to look at this. One is you could ask the question like Judge Luck asked in oral argument in this case on the Eleventh Circuit, you know, what if a polling place was located intentionally in a location that was known to flood every November and that was just understood? The kind of deliberate indifference almost -- maybe you get to that point where there is a choice made that leads to a burden on the right to vote.

But ultimately I think the issue here is there is independent -- for the plaintiffs to be able to find traceability, they have to explain how the actions of the State were not cut off in the causal chain by this independent action by a third party to actually engage in manipulation of the system.

Again, I think this is a theme you will hear a lot today too that every voting system has vulnerabilities. There's vulnerabilities in an electronic-based system. And there are vulnerabilities in the plaintiffs' preferred hand-marked paper ballot system. But just because the State decides to use one system over another and encounter one set of vulnerabilities versus another doesn't mean that you get traceability to the State defendants.

I'll also address, Your Honor, the State Election

Board question you had asked. From our perspective, post *Jacobson*, the Court can't order the State Election Board to adopt a regulation. You can't order the State Election Board to necessarily take action and investigate something. So from our perspective, the State Election Board are not proper defendants for any issues in the case that are remaining.

But to the extent the case is only about ballot-marking devices, we think they are definitely not proper parties because that is reserved by statute solely to the Secretary. So that was our argument on that point there.

So let me close out my portion of the standing question about what the plaintiffs' experts say about Dominion equipment in Georgia in this case versus how it impacts the injury claims otherwise.

And so in, for example, our statement of material facts, we have the statement, experts recognize BMDs as a safe and secure voting system, citing the National Academy of Sciences study. And the plaintiffs dispute that. They say that new science has developed since that was first stated.

In Dr. Halderman's deposition, he stated when asked, you can't say that Joe Biden won the electoral votes in Georgia without some election fraud being involved? And the answer was, as an expert, I cannot rule out the possibility. And exploit those in a way that would have affected the outcome of the 2020 Presidential election in Georgia; correct? And his

comment was, I have no evidence that that happened, but I can't rule it out.

Similarly, Dr. Halderman testified that every Georgia voter has a rational reason for doubt of their vote being counted as long as Georgia uses Dominion ballot-marking devices. The Coalition plaintiffs have said similarly there is a reasonable basis to question every election conducted in Georgia as long as we use Dominion BMDs.

But then in contrast to that in terms of where the injury goes, is it hacking, is it access, the plaintiffs all signed a document -- and this is part of Dr. Halderman's deposition on November 16, 2020 -- that says specifically, altering an election outcome involves more than simply the existence of a technical vulnerability. Because as we have emphasized here, a vulnerability alone is not an injury. It is maybe something that could become an injury later. But it is not an injury today. And it is not an injury for purposes of standing. And that is a statement that was signed by Dr. Appel; it was signed by our expert, Dr. Gilbert; by Dr. Halderman; by Mr. Hursti. All of them agreed a vulnerability alone doesn't get you across a compromise of the system.

And so, Your Honor, from the State defendants' perspective, the time has come to remove this last lingering cloud over the Dominion system in Georgia and dismiss this case

based on jurisdiction alone because the plaintiffs cannot demonstrate a concrete and particularized injury that is traceable to the State defendants that we can remedy.

So with that, unless the Court has other questions, I'll conclude the standing portion of our argument. Then we can either go to Fulton defendants on standing, or however you would like to proceed from there, Your Honor.

THE COURT: I think that is -- I think it is fine. We can move on.

MR. TYSON: Thank you, Your Honor.

THE COURT: Thank you.

Did Fulton have any -- was Fulton County going to say anything?

MR. LOWMAN: No, Your Honor.

THE COURT: All right. Thank you.

MR. CROSS: Could I hand these up?

THE COURT: Yes.

MR. CROSS: May it please the Court, Your Honor.

THE COURT: Yes.

MR. CROSS: So like I said earlier, I'm just going to hit a few macro points. Then Ms. Swanbeck is going to address standing for us. And I believe Mr. McGuire is going to do it for the Coalition.

Let me just start though where Mr. Tyson just finished, which was -- I think he doesn't realize it. But he

just acknowledged standing in this case because -- or at least he acknowledged that his own expert, Dr. Juan Gilbert, acknowledges standing. Because he is right, there is a letter that is signed by their own expert that says, as he just said, a vulnerability can become an injury in the future.

And what they do in their brief is they fundamentally misstate the legal standard, and they have done that again today. You heard him talk about how the injury has to be certainly impending. And that's what they say in their brief.

That is misleading because it is only part of the standard. As Your Honor pointed out in your questions, the Eleventh Circuit, among other courts, including the Supreme Court in *Spokeo* and *Clapper*, have been very clear that you don't have to have suffered that particular harm yet. If it is a substantial risk of harm, that is enough for standing.

And I'm going to talk through that a little more and particularly focus on the *Muransky* decision, which I think is a really helpful decision for us and for the Court.

He also said, you know, Dr. Halderman testified he can't rule out the possibility that something happened in an election that may have affected votes or outcomes.

Well, of course, he can't. I mean, he is a computer science expert. He is a leading cybersecurity expert who is aware of vulnerabilities. The sad reality is that no one can rule that out as a definitive possibility.

And we're not -- that is not our case. No one is saying that there has to be a voting system that rules that out as any possibility. What we're talking about is a standard that just says the system has to be reasonably reliable. And I'm going to explain what that means and why that is important.

Now, let me just take us a step back -- oh, one thing I think I can probably help with, Your Honor. On the DREs, speaking for the Curling plaintiffs, we do not dispute -- and we tried to make this clear in our brief -- the counts that go to the DREs, the legal claims to the DREs themselves, we do not dispute that those are moot. We won. We prevailed. We have an injunction that remains in place today. The State complied with that injunction, as Secretary Raffensperger himself has acknowledged on numerous occasions, including in testimony before Congress.

It is a little frustrating because Your Honor might recall we predicted this. We were before Your Honor about two years ago asking to dismiss those claims ourselves as moot. And the State objected. And we said, well, they are going to do it at summary judgment. And now here we are. But we have no objection to dismissing the claims as long as that doesn't preclude us from relying on evidence, for example, that we have developed around the DREs to the extent the Court finds that it is relevant for the BMD system.

So let me just start here. I will tell Your Honor,

as many summary judgment arguments as I have done, I have never once started out with the standard because the judges are intimately familiar, as you are, with it. But it matters here. And here is why. The State in their briefing and their argument today completely ignore the standard. And they are arguing this as if we are at trial, as if Your Honor gets to call balls and strikes on the facts. And you don't. It is not allowed at this stage.

And this is how Mr. Tyson began his argument. He said, there aren't any issues remaining for trial. That may be one of the most inaccurate statements I have ever heard in a court of law because every party in this case agrees that there are hundreds of material facts that this Court has to resolve.

You can start with the State's own filing. It is a very unusual summary judgment filing for a defendant. Normally, defendants come in with a really small set of facts. They say, this is all that matters, they are undisputed, and they resolve the case in our favor.

To the State's credit, they acknowledge the dense record and the complexity of this case. They put in a statement of material facts of over 400. They have told this Court that every single one of those facts is material to the outcome of this case. We have disputed well over half. We have disputed them with evidence -- with reams of evidence, documents and testimony from the State, from third parties like

the folks involved in the Coffee County intrusion.

So I would respectfully submit to Your Honor, looking at the scope of the briefing, the scope of the issues, the complexity of some of the issues, it may seem that this is a challenging motion on which Your Honor has to write a lengthy detailed decision.

I respectfully submit, Your Honor, this right here resolves it. Your Honor can and I would say should write a single-page ruling that says that the defendants acknowledge that there are numerous material facts and that under the Rule 56 standard, which binds the Court, we have to go to trial. That is the end of it.

What they are asking you to do is for some reason to go beyond that and wade in to fact issues and fact disputes and legal issues that you are going to have to resolve at trial. It makes no sense to do that now.

THE COURT: Well, don't I have to wade into standing?

MR. CROSS: That is where you anticipated I was going. Yes, Your Honor.

The reason the answer is no is because, again, when you look at their own briefing, even their standing arguments rely on disputed facts. And those are facts that have to get resolved at trial where we have an opportunity to prove up that we're right and they are wrong. Your Honor doesn't get to resolve those fact disputes here, even as to the standing

issue.

Instead, what Your Honor has to do under Rule 56 is to construe all those fact disputes in our favor. You have to take the facts in the light most favorable to us. All inferences have to be drawn in our favor. And they are asking you to do the opposite, to draw all of these fact arguments that they want to make in their favor. That only happens at trial.

So as we have said from the beginning of this case, it is not unusual -- there are cases like this. We have cited authority on this -- standing oftentimes is bound up in a lot of the same fact disputes that go to the merits. That is intimately true in this case. And they acknowledge it in the way that they have briefed it. So I would like to make it as easy for Your Honor as we can to move on. But that is where we are.

The two other things I want to touch on briefly, Your Honor, their reply brief accuses -- they call us, I think, a weathervane spinning in the wind or something to that effect. And candidly, Your Honor, we were scratching our heads. We couldn't figure out what that was about.

Our theory has always been consistent. From the very start of this case on the DREs, certainly the fact aspects of how that -- what the constitutional violation is has moved over time as we have dealt with different systems that have some of

the same and some different vulnerabilities and problems.

But again and again in this case, we have stated our theory exactly the same, which is a fundamental right to participate in the election process that accurately and reliably records their votes. That is the standard that we're arguing here. And it comes straight out of the Supreme Court. And that their holding is it is not just the right to cast a vote but to have your vote counted.

Now, what has changed? The defendants' theory has fundamentally shifted. And there is a reason for that. Because every time we have met the standard that they have acknowledged was the standard we had to meet, they moved the goal post. It is like we are running for the end zone and every time we get there they move it another 100 yards and say you haven't scored yet.

Look at how this has evolved. In 2019, this is what they said. Curling and Coalition plaintiffs' respective complaints are devoid of any allegations that hacking, security vulnerabilities, or other problems have been identified -- not just exploited -- but even identified in Georgia's BMD voting system. Well, we hit that out of the park with the DREs and then with Dr. Halderman's report on the BMD system.

2020, they say, Curling plaintiffs do not point to any new identified active security risks or hacking potential. Again, no argument that we have to show actual hacks, that we

have to show a security risk or hacking potential. Again, we hit that out of the park with Dr. Halderman's report.

Then we get to 2021. Then they say, plaintiffs here do not allege an actual breach of the BMD system. They say in *Tsao* there that had been an actual compromise to the point of sale system. Well, then we hit that out of the park because we had the Coffee County breach, an actual compromise of the voting system in Georgia in its operational environment, with all of the internet connectivity and access to removable media, every aspect of that system.

So they move the goal post again to where we are today where now their theory is it doesn't matter that you have shown it has been compromised. It doesn't matter that you have shown that there is this breach. It doesn't matter that you show the system has been hacked. Now you have to show that your individual votes were altered as a result of all of this terrible stuff that has happened that we have never been able to protect voters against and that we told the Court for years was impossible.

And so that is simply not the law. And we will talk through that more today. But you can see how the goal posts have moved continuously as we met every standard they have thrown up.

Here is where we are, Your Honor. As we said before, the U.S. Supreme Court has made clear that the right to vote is

the most fundamental of all rights. We have been over this. But it is also the right to participate in the democratic process, and it is the right to have your vote count as cast, to have it counted.

Their approach -- when you read their briefs and you hear their arguments, what they are asking the Court to conclude is that is not the right, that the sole extent of their duty is to just offer a system that allows you to cast your vote and nothing more. That they have discharged their duty at which you have cast it. And that is wrong.

And you can see it in exactly what they say. Taking the first quote at the bottom, this is -- this was mind-blowing to us when we read this in their reply brief. They wrote this as the State. There is no legally protected interest in verifying one's vote or in voting on a reasonably secure system.

That absolutely cannot be right. And here is why: If the right to vote goes beyond casting a vote and includes the right to have your vote counted, then the system has, at a bare minimum, to have these characteristics. And the reason is: If a voter can't verify that their ballot for tabulation -- and, again, we're not talking about verifying after it has been tabulated. We're not suggesting that voters get to go into the back room of seeing ballots counted in some way or dig into the software themselves and figure out things.

The point is: Verifying for tabulation. That's what we write in our brief. If they can't verify that the ballot on its face reflects their selections, then their vote is truly illusory. If the only thing the State is obliged to do is give them a system that spits out a ballot and they then tabulate that and leave and they have no idea if what is getting tabulated reflects their selection, then it is not a right to have your vote counted. It is merely a right to cast a vote.

And the second part of this is also important, which gets to what I was --

THE COURT: Let me just stop you right there.

MR. CROSS: Sure.

THE COURT: And while I completely recognize and at one level embrace your thought, at the same time, you know, historically people have voted and they used lever machines and all sorts -- and paper ballots in boxes and had -- didn't know whether it was counted or not. I mean, we don't know how something is counted in the end. We are hoping that there is an honest process.

But that is sort of my question about when you say you have the right to verify. I mean, yes, we have a right to look at what is being -- as we're casting our ballots. And, you know, we have a right not to be in a rigged system or a system that doesn't reflect anyone's votes or being in a totalitarian state where you nominally get to vote but it

doesn't make any -- it is not really true.

But I'm not sure how you cross the bridge exactly when you say I have an absolute right -- I have a right to look at whether -- at my vote and see is what you are saying. But you are taking it, it seems to me, several yards further.

MR. CROSS: And that gets to the reasonable reliability point, Your Honor. But I do want to be clear. When we're talking about verifying a vote, we're talking about verifying the ballot. That is what we're saying.

The verification part of what we're arguing is just verifying the ballot. Your ability to look at your ballot and know that the selections that are going to be tabulated -- right? -- that that is accurate, reflects what you cast.

THE COURT: All right.

MR. CROSS: And so that is not doable in this system.

Now to get to your question is the reasonably secure piece. So what the State says is there is no right -- no legally protected interest in a reasonably secure system.

Well, that's where we get to the question you're asking, which is yes, once the voter leaves, they don't know whether their vote actually counts. There are things that can happen. Right? There are things that have happened in the past, whether it is a glitch or it is someone engaging in some sort of malconduct. That is why the reasonable security is so important. Because for voters to have confidence -- and the

State themselves emphasized the critical importance of voter confidence -- you have to be able to trust that this system, grounded in facts and reality and science, not just wishful thinking as the State tends to argue -- that it is reasonably secure and so you can have reasonable confidence that your vote counts.

This is what they are arguing, which is why it is so troubling. If a voter does not have a legally protected interest in a reasonably secure system, which is the lowest measure of security -- right? -- that it is just reasonable -- we're not saying gold standard. We're not saying an old castle. It just has to be reasonably secure.

And courts apply reasonable standards all over. In fact, in this context, they themselves argue that they only have to have an interest in -- or defend a system that is reasonable and nondiscriminatory. So even in the voting context when the courts look at balancing the interests the State has against the burden, it talks about a reasonable nondiscriminatory system. So the courts are saying it has to be a reasonable system.

If it is not reasonably secure, then the only thing left is something that is reasonably insecure or unreasonably insecure. I don't actually even know what they are arguing. But that is the nominal measure that anyone can articulate.

And so if the State is saying it doesn't have to have

even the nominal measure of security, of reliability, then your vote is truly illusory. And that is all we are saying, Your Honor, particularly in light of what we have produced here.

Just briefly, Your Honor, again the goal posts keep moving. When we were here in 2020, they acknowledge that there was a burden. You know, the argument at that time was that the burden was slight or in Mr. Tyson's words extremely slight. And they argued voters have the opportunity to verify the ballots.

Now we're facing a new theory, which is there is no burden at all and that there is not even a legally cognizable interest in verifying your ballot. And that cannot be the law, Your Honor.

As Your Honor has shown, we have ample evidence of injury. They have offered no new facts, no new evidence on which Your Honor would reach a different finding.

They literally cite five exhibits in their entire brief. Their whole argument -- and I think in their reply brief they cite one exhibit, which is a hearing transcript.

This is not summary judgment. This is not them coming in and saying there is new evidence to reach a different ruling. That evidence is one in which a reasonable fact-finder can never rule in the plaintiffs' favor. They are just recycling the same arguments and telling Your Honor you got it wrong.

Let me finish with *Muransky* and then hand it to Ms. Swanbeck. They spent a lot of time emphasizing *Muransky*. Your Honor asked about this. *Muransky*, I think, just is the nail in the coffin of their argument on the standard for both standing and the *Anderson-Burdick* injury piece because they argue those two similarly and they certainly turn on similar facts.

So they say that we have to show some sort of injury -- that we have to show some misuse of data. That is what they say. We heard it again today. That is a fundamentally misstatement of the law. *Muransky* actually says the opposite.

What it says is, even without any direct harm, a plaintiff can establish an injury in fact by showing that a statutory violation created a real -- a risk of real harm. And we're arguing, Your Honor, that we have substantial evidence of a risk of real harm, Your Honor.

The court goes on, what is required then? The plaintiff needs to plead an injury that is concrete, particularized, and actual or imminent rather than conjecture or hypothetical. Our inquiry narrows again. What they say concrete is, is it just has to be real. It has to be a real injury in the future.

And here the court goes on further, Your Honor, rejecting the argument that the State has made here. In

particular makes the point, Your Honor, both identity theft and a material risk of identity theft plainly qualifies injuries under the statute and under this opinion. Because it says, again, to begin, this opinion makes clear that anyone who properly pleads a material risk of identity theft would have standing. The court then goes on again, factual allegations that establish a risk that is substantial, significant, or poses a realistic danger will clear this bar.

We have put in reams of evidence from the leading election security experts, Your Honor. We clearly get beyond this bar at least under the Rule 56 standard.

Now, at trial, maybe Your Honor will disagree with us. But at this point in the case, that is not a decision Your Honor gets to make.

THE COURT: And I think it is in *Tsao* that they actually show -- that the plaintiff actually showed there was a -- something like a 16 percent chance of hacking and it was -- which seems to me, frankly, from a personal perspective a real one I wouldn't like to live with. But it didn't seem to bother the circuit.

MR. CROSS: Right. And Ms. Swanbeck is going to dig into this more. But I will just say one of the easy distinguishing factors for *Tsao* and *Muransky* is -- what the Court points out there is there really is no -- there are no facts substantiating their harm or that there is a substantial

risk.

You have got the GAO report, for example, that says it is a nominal risk. I agree with you. From a consumer standpoint, it seems like a significant risk. The Eleventh Circuit disagreed. But that is very different here. Right? Because here we have got the CISA report that says the opposite. CISA has come in and validated our findings and said to the State, these things can be exploited; and if you don't mitigate them, they likely will be.

And we sit here today, almost a year later, and they have not mitigated these measures, as they tell you. And so, again, our evidence goes way beyond anything in *Tsao* that is pled or in *Muransky*. And Ms. Swanbeck will dig into that a little more.

And so what we're faced with again is briefing and arguments that just sort of ignore the reality of the evidence. They don't respond to our evidence at all. When you look at their reply brief, it is just legal arguments. There is no response and no engagement on the facts. And they say things like plaintiffs' possess, quote, idiosyncratic views of the risk of using BMD-like systems.

Respectfully, Your Honor, the only idiosyncratic view on BMD systems is the State of Georgia. They do not have a single election security expert -- not one -- who is here telling Your Honor that it is okay to use this system. Not

one. Ben Adida says he tells his clients, use hand-marked paper ballots and a BMD for those who need them, people with disabilities, for example. Gilbert -- Dr. Gilbert has literally gotten a patent or is seeking a patent and designing one because of the same flaws that we have identified, that they are not transparent, they are not reliable.

Michael Shamos said, don't use this, don't use QR codes.

Dr. Wenke Lee said don't use this.

So there isn't any idiosyncratic view on BMDs. It is not on our side of the aisle, Your Honor. And that at the very least raises a fact dispute on both standing and merits that has to go to trial.

Last thing, Your Honor, I do want to drive home the simplicity of this. When we were in the DREs, it was a bigger lift because it was -- you had to have a whole new system. That is not where we are.

As I said before, there is no argument from the State that what we are asking poses any burden on them at all. They don't offer any allegations or evidence much less on cost, on inconvenience, on feasibility. We heard that time and time again in the PI context. Here, none of those arguments appear in their brief. And they don't make any effort to argue that what they are doing is narrowly tailored, even to an important -- rationally related to an important interest, much

less a compelling one.

THE COURT: Well, should I still consider the record before me about the problems with paper ballots? I mean, there were many -- there was a lot of evidence about that. I raised concerns about them also in the case from the very start in terms of administration and feasibility.

Are you saying that none of that can be considered at this juncture?

MR. CROSS: I think it depends on what it is. I guess I would say two arguments. One, I think Your Honor cannot consider it for the purpose of this motion because they don't rely on it. If they are going to make that argument, they are bound by the scope of what is in their papers. And that is what the Court has to consider.

The second thing I would say is it also depends on what it is. For example, you know, they rely on things like Dr. Coomer's declaration, which is not -- the Court can't consider because there is no testimony that is going to come in from him at trial. So I think you would even have to dig down to whether the underlying evidence is admissible.

But the more fundamental point, Your Honor, on the hand-marked paper ballots is sure, there are issues with hand-marked paper ballots. There are issues with every voting system. But how the balancing works out and how the injury assessment is determined for standing and for the merits is a

quintessential fact dispute that has to be resolved at trial.

And, Your Honor, you are going to hear that from us over and over again because our sense is where they want to draw the Court is into an engagement on the facts and on the merits and that is how they brief it, that is how they argue it today. And that is not where we are.

The only question for the Court is do we have just enough evidence taken in the light most favorable to us, taking all inferences in our favor -- just enough evidence on -- and at least one disputed fact to get to trial on standing and on the merits. And the answer to that, Your Honor, is beyond dispute when the State itself tells you there are over 400 material facts that this Court has to resolve in their favor to grant summary judgment.

With that, I'll hand it off to Ms. Swanbeck for further discussion.

THE COURT: I'm going to take a restroom break. So I'm going to say let's just take five minutes.

COURTROOM SECURITY OFFICER: All rise.

(A brief break was taken at 2:29 PM.)

THE COURT: Mr. Cross, can I ask you one question before your colleague comes up? I just want to clarify.

Are you asserting a right to verify essentially -- your ballot as essentially as a part of the right to vote?

MR. CROSS: Yes.

THE COURT: And that basically you are saying encompasses I get to look at the ballot and check that it actually is a -- it reflects my choices?

MR. CROSS: Correct. Correct.

THE COURT: And does it mean that under the circumstances here I get to actually have a printed version? Because, of course, for years, people voted without seeing a printed version when they did at least lever voting.

MR. CROSS: If I could answer that in two parts, Your Honor. The science and the overwhelming consensus is that it really should be a hand-marked paper ballot because then you don't have to verify it. Right? You know all the marks you made. If there is a mistake, that's your mistake. But you know that whatever selection is on there, you made that selection. And that is why the overwhelming consensus is you should do hand-marked paper ballots because they are inherently verified by the voter having filled them out.

THE COURT: All right. Well, that is scientific and a judgment. But I'm just asking you from a legal perspective in the context here --

MR. CROSS: Yes. So that is why it was a two-part answer.

The other part is yes. It has to at least have a paper record. And there doesn't seem to be a dispute about that. The State even seems to acknowledge coming out of

shutting down the DREs -- you have to do -- you have to have today a paper record that a voter can and, in fact, has verified that it reflects their selections. Right? So that the moment it gets tabulated, whatever happens from there gets to the second part of what we're talking about. But the moment it gets tabulated, that that ballot reflects their selections and they can be sure of that. That -- Your Honor, if that is not at least --

THE COURT: That is separate and apart from --

MR. CROSS: The reasonable reliability piece.

THE COURT: The reasonable reliability. Is that what you are saying?

MR. CROSS: Yes. Our view is those two work in conjunction. Because if you have one without the other, you have a system that doesn't provide -- it doesn't provide a voter any reasonable expectation or confidence that it will count.

Again, the Supreme Court says it has to be a right to count. So you have to be able to verify the ballot. So now I, as a voter, know, okay, once this goes in, it reflects my choices. Once it gets tabulated, what is getting tabulated reflects my choices. And if there is an issue later with the tabulation and there is a hand recount or an audit, that ballot will reflect my choices in terms of what they are looking at.

THE COURT: What were you saying about the Supreme

Court has said about the count?

MR. CROSS: Just that the Supreme Court has repeatedly said that the right to vote is not just the right to cast a vote but to have it counted.

So as we take the State's position, the State is sort of writing off that last piece to just say really all they have to do is provide a means for you to cast a vote. Because if you can't verify your selections and the system doesn't have to at least be reasonably reliable, which means it doesn't have to be reliable at all because there is no measure of reliability less than reasonableness, then it is just an illusory system.

All you are really doing -- all the State is telling you is we'll let you cast a vote. Beyond that, cross your fingers, hope and pray it goes the way you want.

THE COURT: What do you think is your best authority for the second part of the prong here --

MR. CROSS: Sure.

THE COURT: -- about it has got to have reasonable reliability, that you have to be -- that it actually -- your vote really does have to be properly counted?

MR. CROSS: So a couple of things here, Your Honor. Here on slide six, *U.S. v. Classic* is I think maybe the first articulation of it. The Court also talks about it in the *Reynolds v. Sims*.

But, again the court says, obviously included within

the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted.

So, again, without those two metrics, you can't -- and the other thing that I sort of skipped over, they rely heavily on the *New Project Georgia* case putting aside footnote one, in which case no one is really allowed to rely on it. Just putting it aside since they are, we'll respond to it.

Here the Eleventh Circuit emphasizes, again citing the *Burdick* case in the Supreme Court, we also know that the right to vote is the right to participate in the electoral process that is -- and this is the key language -- necessarily structured to maintain the integrity of the democratic system.

What we would say, Your Honor, is if the voting system doesn't at least allow a voter to ensure that their ballot reflects their selections and it is not at least reliable by some reasonable measure, meaning it is literally unreliable or you just don't know, then it does not at all meet the requirement of necessarily structured to maintain the integrity of the democratic system.

Because a voting system where voters have no idea if their ballots reflect their choices and then they don't know if the system itself is reliable to tabulate those choices doesn't help the integrity of the democratic system at all.

In fact, what it does is undermine that system,

basically creates opportunity for voters to lose confidence, and somehow we get crazy conspiracy theories, which is what we are trying to protect against.

Did I answer your question?

THE COURT: And just briefly -- and then let's move on to your colleague -- why do people need to verify their selection? Why do people need that right as part and parcel of the right to cast a vote?

MR. CROSS: Because, again, if they can't verify their selections, then they don't know if what is going to get tabulated reflects their voice as a voter. Right? And the courts have said your voice -- it is actually in here. Right? No right is more precious in a free country than that of having a voice in the election of those who make the laws.

If you can't verify that your ballot reflects your voice in that election, then your vote is illusory at best. And so, again, it is inherent in the notion that every voter has a personal and individualized voice. The ballot is what reflects that voice. It is the record of that voice. It is what gets tabulated for that voice.

And if they -- if they don't even know what it reflects, then they have no choice in the process, unless they just get lucky. And luck should not be the premise of the most fundamental right of all rights that we bear as citizens of the United States.

THE COURT: All right. Thank you very much.

MR. CROSS: All right.

MS. SWANBECK: May it please the Court, Your Honor.

THE COURT: Yes.

MS. SWANBECK: So as Mr. Cross mentioned, I'll be focusing on the standing arguments today for Curling plaintiffs.

So this Court has held at the motion to dismiss phase that plaintiffs discharge their burden on standing. And defendants simply recycle those same arguments. They don't make any new factually-based arguments. Again, as Mr. Cross mentioned, they only produced five exhibits in their motion and then one on reply.

THE COURT: But it is your burden. And that burden keeps on -- becomes more and more heavy as the litigation proceeds.

So I'm not sure why we are focused on their five exhibits when it is the plaintiffs' burden.

MS. SWANBECK: Yes, Your Honor. That is what I was getting to next is that plaintiffs have amassed a massive record of evidence here. We have presented hundreds of disputed -- material disputed facts that a fact-finder at trial should weigh. But -- and the fact that the defendants ignore those facts should not give this Court any reason to also ignore those facts.

So because the State defendants made some points on the one plaintiff rule that I would like to respond to up top, I'll move to that point first.

THE COURT: Okay. Great.

MS. SWANBECK: So as you know, Your Honor, the Eleventh Circuit decision handed down in October ruled that the Coalition plaintiffs have standing to bring their voting -- their challenges due to the diversion of resources that they have to make and the harms that they have to ameliorate on election day.

And that is -- that is an opinion that was made at the preliminary injunction phase with an evidentiary record and is binding on this Court.

And we believe that Curling plaintiffs should be allowed to proceed under the one plaintiff rule in addition -- we should be allowed to proceed under the one plaintiff rule because it is a matter of judicial efficiency at this point where the Court has looked at standing several times in this case already and has repeatedly rejected the State's argument. So as matter of judicial efficiency, it makes sense to proceed -- to proceed beyond standing at this point.

And all of the cases that State defendants rely on are inapposite for the basic reason that, first, they rely on only damages cases. They rely on *TransUnion* and *Town of Chester v. Laroe*, which again courts from the Supreme Court,

Eleventh Circuit, courts across the country treat damages cases differently for purposes of the one plaintiff rule. And that is because with damages cases there's the potential risk of directing a defendant to -- to pay out additional monetary damages to a plaintiff. But that is not the case in injunctive relief.

THE COURT: Is it because of that or because of the individualized nature of a damage claim?

MS. SWANBECK: Your Honor, it is because of the fact that it is monetary damages. And that is why -- that is explicitly why courts across the country treat injunctive relief cases differently and are much more likely to use the one plaintiff rule in injunctive relief cases because of the fact that the relief is inherently duplicative where two different plaintiff groups are asking for the same kinds of relief.

And that gets to the other point that they made that Curling and Coalition plaintiffs are making different claims and different -- or asking for different relief. And we don't believe that that is true on a practical level here. We're both asking for relief as it relates to the BMD system. Our claims are fully encompassed by the Coalition's claims here.

And as far as defendants quibble with minor differences in the type of relief, that doesn't matter because, as *Town of Chester v. Laroe* said, it is the same form of relief

that matters. Not whether the type -- the relief requested is exactly the same. That is not what any court has used that is binding on this Court. For example, *Crawford v. Marion County*, which is a, you know, seminal voting rights case -- the court in that case actually did apply the one plaintiff rule. And in that case, it was two separate plaintiff groups. One was made up of William Crawford and other candidates. And the other plaintiff group was organizational mainly.

And in that case, William Crawford's group had filed a case in state court with their own complaint. It had been removed to federal court and consolidated with a case brought by the Indiana democratic party.

So, again, in that case, two separate plaintiff groups, one individual candidates and one organizational, proceeding on different complaints, represented by different counsel. And in that case, the Supreme Court did not hesitate to use the one plaintiff rule. And that is even though the complaints included that there were different complaints involved.

William Crawford's plaintiff group alleged a violation of the Fourteenth Amendment, the VRA, and the Indiana state constitution, and the Indiana democratic party alleged a violation of the Fourteenth Amendment, the VRA, and the First Amendment. They didn't have any claim involving the Indiana state constitution. And yet the Supreme Court and the Seventh

Circuit didn't hesitate to apply the one plaintiff rule there to allow William Crawford and his group to proceed in the case because the Indiana democratic party group had clearly established standing. So that is very clear Supreme Court precedence.

But there is also case law from this district not too long ago, *Martin v. Kemp*, which involved an incredibly similar case as this. That involved organizational plaintiffs and a group of individual plaintiffs who are each part of a case proceeding under their own complaints and represented by their own counsel.

It brought challenge against the State defendants or -- sorry -- the Georgia statute -- that regulation that permitted the rejection of absentee ballot applications and alleged procedural and substantive due process claims.

And in that case, the complaints were similar but they were not identical. And in particular, the relief part of those complaints were different. The individuals claims were encompassed entirely by the organizational plaintiffs' claims. But in terms of the form of relief that they asked for, they were not. They -- they asked for the same form of relief, injunctive relief, against that particular regulation. But they did not actually have the same identical language.

And in particular, they asked for more specific relief. They asked for the court to order specific procedures

to be followed by the state in adjudicating and providing notice for absentee ballot applications and signature mismatches.

And the Court there in this district didn't hesitate to use the one plaintiff rule. So it is just not an uncommon phenomenon for courts to use the one plaintiff rule in cases incredibly similar to this one.

THE COURT: Well, the defendants argue that there have been differences and disagreements in the past between the plaintiffs as to how -- how to proceed and what relief they are seeking. And I know that at some point that was true. I haven't seen it manifested in years. But I'll give you the opportunity to address that.

MS. SWANBECK: Of course, Your Honor.

First, I would just point out that the binding precedent here doesn't ever mention whether there are disagreements between the parties. We have not seen any case where anything but the -- how similar the complaints or the relief are.

And, second, the parties have not had really any disagreements on a macro level as to case strategy. Whether there has been some minor back-and-forth, that is potentially true. But there haven't been any macro disagreements here to the extent that this Court finds it relevant.

But, again, that is not really what we're looking at

here. We're looking at the complaint or -- sorry -- the claims and the relief.

And that gets to the point of fees that State defendants find very relevant. First, I would like to note that courts have used their discretion in awarding attorneys' fees including to plaintiffs in cases where the plaintiff was allowed to proceed under the one plaintiff rule.

For instance, in the Fourth Circuit in a case called *Shaw v. Hunt*, that court ruled that plaintiffs could be considered prevailing plaintiffs for purposes of awarding attorneys' fees. And that is because the plaintiffs in that case had made significant contributions to the outcome of the case. So, one, there are cases where attorneys' fees can be awarded to plaintiffs.

And -- but putting that aside for a second, Your Honor --

THE COURT: You mean to both sets of plaintiffs?

MS. SWANBECK: Both sets, Your Honor. Sorry.

Putting that aside, Your Honor, the only question today is will we go to trial. And since the Coalition plaintiffs already have established standing, that question is answered. The Coalition will be going to trial. But it is just a question of whether Curling will be allowed in.

And Curling plaintiffs fully intend to completely prove up standing by presenting numerous facts that go to

standing at trial. As Mr. Cross said, the standing and the merits here are really bound up together.

And so by the time we eventually get to attorneys' fees, the standing elements will be completely proven up. So it is really redundant to focus on them at this point. And it makes more sense as a matter of judicial efficiency to proceed to trial under the one plaintiff rule.

And then one final note on this, Your Honor, because I want to make sure to discuss how wrong the State defendants are on the law.

THE COURT: The law of what?

MS. SWANBECK: I'm sorry?

THE COURT: On the law of what?

MS. SWANBECK: On the case law, Your Honor.

THE COURT: All right. Make your last point. And then I'll find out what you are trying to say.

MS. SWANBECK: Sorry. So they rely on *Town of Chester v. Laroe* and *Thiebaut v. Colorado Springs Utilities*. First on *Town of Chester v. Laroe*, as I mentioned, that is a damages case. And, second, they rely on it for the proposition that plaintiffs must seek identical relief. But that is not what the Court said at all. It just said again, as I mentioned, that plaintiffs must each seek the same form of relief requested in the complaint.

And importantly in that case, the court did not make

any finding as to whether the plaintiffs' claims were -- and requested relief were different or similar enough to proceed under the one plaintiff rule. It just said that they have to have the same form of relief. And it remanded to the lower court to make a consideration.

And then on *Thiebaut*, which they also used for the proposition that the claims and the relief must be identical, that was not at all addressed in that case. That case was simply a question where a plaintiff was trying to argue to the Tenth Circuit that the one plaintiff rule is a mandatory rule instead of a rule of discretion for the court.

And in that case, the circuit court rightly ruled of course not. The court has to -- the lower court has to look at whether this is a matter of judicial efficiency. But there is nothing in that ruling that addressed how similar or different the complaint must be.

THE COURT: Thank you.

MS. SWANBECK: With that, I'll move on to the standing argument.

So if Your Honor decides that standing is appropriate to look at here, I want to first discuss some of the concreteness arguments that defendants raise and particularly *Tsao* and *Clapper*.

So upfront, as plaintiffs have repeatedly noted, the system causes injuries even if it were to operate as designed.

So plaintiffs were injured in all previous elections using the system, and they are certain to experience this harm again if this system is still in place in the next election. And, again, plaintiffs have alleged hundreds of facts going to that that are hotly disputed in this case and should be proven up at trial.

Second, State defendants mischaracterize the *Tsao* court's holding and the standard that the Eleventh Circuit was operating under. As you can see here, they say literally the opposite of what the *Tsao* court said. The *Tsao* court said, evidence of actual misuse is not necessary for a plaintiff to establish standing following a data breach.

And then somehow in the State defendants' reply, it turns into a plaintiff must demonstrate specific evidence of at least some use -- misuse of the relevant data. And that is just not what the *Tsao* court said at all.

Second, in *Tsao*, the court really conducted a factual inquiry, a deep dive into the particular facts that *Tsao*, the plaintiff, was alleging in the particular context of a data breach, which is incredibly different from the voting rights context.

In *Tsao*, the court looked at, one, the fact that the plaintiff had immediately canceled his credit cards. So the fact that he had said -- he had presented evidence about like a 16 percent chance wasn't actually applicable to him because he

had immediately been able to mitigate the harm in that case.

And, second, he had provided that statistic in a Government report, the GAO report, that he presented. But the GAO report actually presented evidence that worked against him. Because the Government in that report said that the type of information that was exposed in the data breach that Tsao was -- was bringing his case about -- the type of information released was not actually likely to lead to any fraud and that furthermore in general the report said that breaches of consumer information don't tend to lead to increases in identity theft or fraud on existing accounts.

So that is why it found that there was not a substantial risk of future harm because it had conducted an intense factual inquiry into Tsao's allegations. And that is in stark contrast to the facts of this case where plaintiffs have alleged a massive record of vulnerabilities and actual manipulation and where election security experts, the intelligence community warn every election cycle that U.S. elections are the target of hacking efforts. And even the defendants' own cybersecurity consultant, Theresa Payton, said that it is not a matter of if but when an election will be hacked. So it is a virtual certainty that this harm will come to pass in this forum.

State defendants argue that Curling plaintiffs' injuries are merely speculative because they cannot demonstrate

a single instance of hacking or manipulation that actually affected the integrity of the election system. That is a quote.

But plaintiffs actually have amassed a massive record of several critical vulnerabilities, as well as numerous circumstances affecting the system's integrity and showing how ill-equipped the system is to withstand attacks.

Defendants flatly ignore these facts, including the breach of the Coffee County election hardware, the uploading of Georgia's election software. And they ignore the fact that that is an instance of manipulation.

Their refusal to grapple with any of these facts shows how necessary it is to have a fact-finder at trial to resolve the bearing that these facts have on the injuries suffered by Curling plaintiffs.

Tsao is also inapplicable here, Your Honor, because as a consumer case the plaintiff was able to mitigate the harm by canceling his credit card as the Eleventh Circuit noted. But plaintiffs have to use this election system going forward if they wish to vote. There is no mitigation that they can take except for the one -- the one alternative that State -- the State defendants offer, which is, oh, you don't like this system, go vote absentee.

And the plaintiffs have tried that here, Your Honor. But that system carries its own burdens as plaintiffs have

demonstrated through the factual record showing that they have each -- or sorry -- that they have suffered burdens. And Donna Price and Donna Curling have suffered actual disenfranchisement trying to use that system.

So the only mitigation measure that the State says that we can take --

THE COURT: Remind me what happened to Ms. Curling. What were the things that happened where they are saying disenfranchised?

MS. SWANBECK: Your Honor, first, Ms. Curling tried to vote absentee. She requested an absentee ballot, and it never actually arrived. The same happened to Ms. Price, Your Honor, where they just didn't ever receive their absentee ballots. So --

THE COURT: Well, you know, there is an argument to me to be made that all election systems are imperfect. And I don't know why the coincidence of their not getting their ballots on a timely basis.

But it is -- I realize that somebody may not still want to vote on one or another system. But they do have that option. It is not like they are deprived of that option by choosing the other basically if it doesn't come in time -- the ballot doesn't come in time.

And I mean, it is not -- it is not ideal. But no one ever said these systems were ran perfectly either.

MS. SWANBECK: No, Your Honor. But we have -- but they have to be reasonably reliable for all of the reasons that Mr. Cross mentioned.

Again, I only mention absentee voting in that context as an analogous attempt at a mitigation measure. But as this Court has already noted, the fact that plaintiffs can vote absentee is not, you know, relevant on the -- to the State defendants' duty to provide a constitutional reasonably reliable in-person voting measure. This Court said that in its order in 2020.

THE COURT: I'm not saying that I was wrong, but I could have been, I mean. I mean, certainly the State probably said I was wrong. So, you know -- and the law has been quickly evolving, let me say, and changing.

MS. SWANBECK: Yes, Your Honor. It has been. And that only increased the burdens that are involved in absentee voting after SB 202.

So if anything, we would say that absentee voting is even harder to use as a mitigation measure.

THE COURT: So are the plaintiffs going to respond to the question of -- or the point made that -- in the record by the defendants that it has been two years since the Coffee County breach, roughly speaking, and that there is no evidence that there has been alteration or a hack or malware since that time?

I mean, it definitely posed risks for the system. But on the other side -- especially when posted on the web, and -- but sort of the obvious question is: In the standing context, is there actually concrete evidence, even if it is not nailed down on all sides, that there was a material risk to the plaintiffs that has been now manifested or to the voters as a result of that --

MS. SWANBECK: Yes, Your Honor -- sorry.

THE COURT: -- as a result of that breach, just to clarify the question?

MS. SWANBECK: Yes, Your Honor. Couple of points on that.

The fact that there is no evidence that votes have been altered doesn't render the risk sort of speculative. If that were the law, then the substantial risk standard would actually be meaningless. Because in every case where the alleged harm is the risk -- or sorry -- in every case where alleged harm is the risk, then plaintiffs would not be able to show any actual harm.

THE COURT: I'm sorry. I don't understand what you are saying.

MS. SWANBECK: Sorry, Your Honor.

THE COURT: That's all right. It may be a glitch in my own brain.

MS. SWANBECK: Let me try again. So if the

substantial -- if that were the law, then the substantial risk standard would be meaningless. Because in every case where the alleged harm is the risk of some future injury, the harm necessarily hasn't happened.

THE COURT: But doesn't there have to be a substantial material risk at minimum?

MS. SWANBECK: Yes, Your Honor.

THE COURT: And how do we assess sort of -- how do we assess when we have reached that point? In one way you might obviously is something had happened. But we have now gone two years. That is why I mention the two years.

I mean, I think it was obviously alarming. But where nothing materializes in two years, does it mean that, in fact, enough proactive measures have been taken and therefore the system is not reasonably at risk?

MS. SWANBECK: No, Your Honor. That is not the case at all.

First, I would like to say, again, this depends on careful consideration of the reams of evidence that plaintiffs have produced in this case related to Coffee County.

And, second, there is no evidence -- as Mr. Tyson just admitted, there is not really evidence that the State has actually mitigated the risks of the system that existed at that point in time. And Gabe Sterling even admitted that the State should implement those mitigations.

And to the extent that they have been working on them, they haven't yet. And time and again in this case, they have insisted that they are working on mitigations.

And, two, they won't be implemented in time for the 2025 election, which means that plaintiffs will -- or sorry -- 2024 election, which means that plaintiffs will experience this harm yet again in the next election.

THE COURT: Or risk of harm.

MS. SWANBECK: Yes, the risk of harm. Again --

THE COURT: All right. So let me just ask you this -- I know that probably Mr. Cross took up some of your time. And I'm going to ask Mr. Cross as well because, you know, obviously the Coalition counsel wants to speak also.

So let's just -- we're at ten after 3:00. I have probably gobbled up more time than was warranted on my questioning in the beginning.

But tell me -- I don't want to cut off your argument. But I also want to make sure, just big picture, that all sides have enough time.

So can you just turn around and all just chat for a second and see where you are on the schedule of time? Are you almost through or not?

MS. SWANBECK: Sorry. Yes, I am. I have a few more points. But yes.

THE COURT: That is fine.

All right. Why don't you try to wrap up in about two minutes. Can you do that?

MS. SWANBECK: Yes, Your Honor.

THE COURT: And then plaintiffs' counsel can confer and -- all right.

(There was a brief pause in the proceedings.)

MS. SWANBECK: Thank you, Your Honor.

First, I just want to check with you and see if there are any particular outstanding questions you have for us.

THE COURT: Well, I guess -- just the tail end of my question was: Does the fact that there has not been an apparent breach in the last two years since the Coffee County breach affect the speculativeness question? Does it just simply make it -- tilt it towards the Government?

MS. SWANBECK: No, Your Honor, that is not the case at all. Because, again, with Coffee County, the information from the system was uploaded to the internet. It has been floating out there, and no one knows who has access to it. The State defendants cannot say for sure who has it. They can't say who still might have hard copies of that data. They can't say where it is online. They can't say what nation states might have been working on it or what other non-nation state hacking groups might have it.

There is the -- we do have evidence that the log-in credentials were shared, that it was downloaded around the

world. So the fact that it hasn't --

THE COURT: You presented that evidence?

MS. SWANBECK: Yes, Your Honor.

THE COURT: That is fine.

MS. SWANBECK: Yes, we have exhibits on that that we can share with you.

THE COURT: Thank you.

MS. SWANBECK: So the fact that it hasn't brought about an actual hack in an election is not relevant here because the data is out there and can be actively worked on.

And, also, I would add that the fact that they haven't held anyone accountable in the last two years increases the risk of harm here. Because the fact that they wouldn't have even known about this breach if it weren't for the plaintiffs in this case -- and the discovery is deeply concerning and would encourage bad actors to take advantage of this system, even though they had multiple red flags that they ignored. We have --

THE COURT: Okay. I understand that. All right. Move on from that.

MS. SWANBECK: Yes, Your Honor. So being mindful of my time, I can wrap up now and turn it over to Ms. Middleton.

THE COURT: Thank you very much.

MR. CROSS: If I could add one quick thing while Mr. McGuire is walking up. Just on that last question, the

only thing I would add is *Muransky* makes clear that the line you're asking about, you know, when do we get across that line on substantial risk, is fact driven. And that at this stage of the case means we go to trial.

Thank you, Your Honor.

MR. McGUIRE: Good afternoon, Your Honor. Robert McGuire for the Coalition plaintiffs. It is nice to see you in person. I'm usually on the television.

I'm going to address standing for us, and Mr. Brown is going to address the merits. And you've already heard a good deal about standing. So I'll basically jump right in.

The purpose of standing -- the purpose of the whole doctrine is to make sure that the people who come in to argue the merits of a case have a stake in outcome. And that is a distinct analysis from whether the merits are going to be successful.

And if there is like one big point that I could make, the high-level point, is that standing is distinct from the merits and it has to be treated distinctly from the merits. And standing in no way depends upon your ability to prevail on the merits.

Standing is a completely distinct analysis. And what you look at when you look at standing is you look at the three elements that are set out in *Spokeo* and all the other cases. They begin with the invasion of a legally cognizable interest.

That interest has to be invaded. The invasion has to be concrete and particularized. And it has to be actual -- it has to be either actual, meaning it has already occurred, or it has to be imminent, meaning it is about to occur. And it can't be conjectural or hypothetical.

In this case, there is an easy way to find standing, and there are a lot of hard ways to find standing. And the State keeps wanting to drag us into the hard ways to find standing, and we don't want to go there. We can prevail, if we have to show the hard ways that we have standing.

But there are a lot of easy ways that we have standing, and they get us into court and allow us to argue the merits. And so I would like to focus on those.

And what those -- what those easy ways are is you look for an injury in fact to a cognizable interest that is caused by the defendants' challenged conduct. And the conduct that we're challenging here is the enforcement of the requirement for in-person voters to use this voting system, the Dominion voting system. If you don't use it in person, you have to use it as an absentee voter.

Each component of the voting system that we're challenging in our two claims imposes injuries on a cognizable interest of the plaintiffs. And those injuries are going to be certainly suffered when our plaintiffs interact with those components of the voting system.

So just to start with the BMD as an example, when a voter interacts with a BMD, they print out a ballot card that is meant to contain their voting selections but they don't know for sure if what is in there actually is their voting selections.

So there's two kinds of injuries there. There is an injury to my interest in knowing for sure that what is going to get counted on this ballot card actually is what I touched on the screen. I can't tell because it is in a QR code. That is an invasion of interest in knowing that what is on that card is my vote.

To the extent that I don't really care about checking my ballot, there is an invasion of my interest in not checking it because the state has rules that require me to check it. I have to check this 40-, 50-item ballot and make sure that all of the races in it are accurate. There is a rule that actually imposes that legal obligation on me.

THE COURT: But we know that no one does that. Because that's all the testimony in the preceding case, that only a very small percentage of people do it. That was the concern the plaintiffs had, that it was a system that discouraged in some ways voter compliance with that principle.

MR. McGUIRE: Yeah. It is the nature of the BMD itself that makes that a problem. Because if you were marking a hand-marked paper ballot, you would have been the person who

put the marks in the different spaces for the options.

What the BMD introduces into that equation is it puts a machine between you and the paper. And so you actually do have to check to see if the paper represents what you wanted to do.

So that is a burden. Whether you want to do it or not, it is a burden to have to do that. To have to verify a machine's interpretation of your physical actions of touching the screen, that is burden. And you have to do it if you want to make sure your votes represent your choices.

So that is kind of a mundane and pedestrian injury. It is not certainly as glorious as, you know, the voting system is subjected to being hacked. But it is an injury that is caused by their requirement that we use this component. And it is redressable by the relief we're seeking.

So we have standing to be in court based on that injury and to make an argument on the merits to defeat that the system is unconstitutional under the *Anderson-Burdick* test. And once we move to the merits, we can bring in all kinds of other arguments that are perhaps more general, that perhaps apply more broadly because we have standing. We have a particularized injury that is related to the conduct we're challenging. So the similar --

THE COURT: Are you saying -- I guess are you saying that the conduct you're challenging is just the requiring you

to go -- the voter to look at the ballot --

MR. McGUIRE: No.

THE COURT: -- under circumstances where you don't -- haven't memorized the ballot? Or what are you --

MR. McGUIRE: No. Well, the conduct we're challenging is the requirement that we use this voting system to vote.

THE COURT: But, you know, there is always a voting system. That would mean every single voting system could be challenged.

MR. McGUIRE: Well, if a person has an interest -- a legally cognizable interest that is invaded, then they would have standing if it is redressable and there is causation. I mean, if it seems like something people shouldn't challenge, they do have standing to come and challenge it.

People challenge things all the time where they are not going to win, but they do have standing because they have an injury that affects them.

THE COURT: Well, what is the injury? That they didn't get to choose the system? I mean, I'm with you -- you know, obviously as Mr. Tyson said, I have been here a long time on this, and they are ready to get rid of me in this case.

But it can't be that any time there is a new voting system you have an automatic right -- you have an automatic right because you're a -- you can bring lawsuits. But that in

terms of your having even arguable standing, there has to be some reason that -- something that evidences harm or risk of harm.

MR. McGUIRE: Right. I think --

THE COURT: All right. I'm just getting tied up in something I don't need to be.

MR. McGUIRE: Well, and perhaps I picked a bad example because there are other injuries that I think there might be more sort of intuitively injurious. Like, for example, HAVA gives the voter a right. It doesn't give the voter a right to sue. But it gives the voter a legal interest in being able to read and correct the errors on their ballot. That cannot be done with BMDs. So that is a legally cognizable interest that would give you standing.

THE COURT: That's a little clearer.

MR. McGUIRE: Yeah. And so the BMD prevents you from doing that. I could go through each component. But we have alleged those kinds of injuries that are kind of mechanical and kind of maybe pedestrian. But they apply to each of the components that we're challenging in the system. And those injuries get us into court.

And we know the State has cited a bunch of cases because obviously these are future injuries that are going to happen when we interact with the voting system. But this is not speculative or hypothetical. We know our people are going

to interact with the voting system. The HAVA injury that I just said is absolutely going to happen to them. It is not speculative at all. It is certainly impending under *Clapper*.

And so whatever case you want to look at, if you want to look at *Tsao*, if you want to look at *Muransky*, *Clapper*, *Spokeo*, or *TransUnion*, we have an injury. It is a future injury that is certainly impending. And, you know, each one of those you could go through and check off why that is true.

But it is true for all of the various injuries that each of the components causes to us. And that's --

THE COURT: What is individual about it as opposed to a group harm to all citizens in the State of Georgia?

MR. McGUIRE: I mean, it is a requirement -- the injuries will be experienced individually. In the same way that if you're on a plane that goes down, everyone on the plane is going to experience an injury from that accident. But it is going to be individually experienced by you. You and your -- hopefully if you survive, you would have a claim.

And I think it is important to look at -- when we're talking about something like the use of a voting system, it is going to affect a lot of people. But that doesn't insulate it from being challenged. It doesn't mean nobody has standing.

Because to the extent people are going to have individual experiences interacting with it that are going to injure them that are not generalized grievances, then they have

standing. And many people might have standing.

Just to jump real quick to the *Wood* case because I think the *Wood* case is a good counter example. In *Wood*, what the Court -- what the Court held was that his injury was essentially -- he alleged two things. The first one was an interest in election integrity. And that was not a Lin Wood specific injury. That was a generalized interest of everyone -- shared by everyone. But he alleged it as his injury, and it wasn't particularized to him.

That is different than a person who is personally experiencing not being able to validate the votes that they just cast because they can't read the QR code and having to figure out if this actually is what they wanted to vote on. That is a very different -- very personalized injury and it is distinct.

The other injury that *Wood* had was -- and I think you might have gotten at this a little bit earlier. Wood brought in an equal protection claim. But the problem with his equal protection claim, if you read the case carefully, is that he didn't allege my vote is diluted compared to what. He didn't have a comparator. And that was actually the grounds that the Eleventh Circuit -- if I recall the case, that the Eleventh Circuit decided his equal protection claim was insufficient.

So we don't think *Wood* is even -- I mean, obviously, it is an Eleventh Circuit precedent. But it doesn't apply

because our injuries are individualized.

Jumping to the question of the organizational standing -- well, actually before I do that, let me get the other two prongs. So there is injury. And then there is two other prongs of standing, which is that it be fairly traceable to the challenged conduct. The injury has to be fairly traceable, and the injury has to redressable by a judicial order.

The fairly traceable element, they have -- the other side has questioned that for Fulton. And they have questioned it for the State Election Board. And we believe the case law is very clear that if an injury is attributable to more than one actor they are both -- relief can be given against either one of them.

And in this case, it is certainly true. Fulton is responsible for the settings of scanners. Fulton is responsible to make sure that we have secrecy in voting. The State Election Board is responsible for enforcing the use of the voting system and for referring people to the Attorney General if they don't comply with the voting laws.

So all of the parties in the case have something -- some role in -- and some causative connection to the injuries that are caused by the conduct we're challenging, which is requiring us to use the voting system. So they are all properly named as defendants because the injury is fairly

traceable to their conduct.

The issue of redressability, which I think -- I mean, obviously, if the Court were to issue an order that people were not required to vote using the Dominion system, that would redress all the injuries that we have raised.

Paper ballots, I think the Court -- Your Honor, you asked the question about aren't there problems with paper ballots. And that is a consideration which doesn't bear on standing. That bears on the kind of relief -- the nature of relief that the Court ultimately awards.

But as far as the injury causation redressability analysis goes, standing exists regardless of what alternatives may be out there.

Coalition for Good Governance is an organization as well. And I think -- I don't know if you have any further questions about the *South Miami* case. We don't believe it changed anything that applies -- that affects us, that diminishes our standing.

We believe that the Eleventh Circuit's finding at the preliminary injunction stage that we had organizational standing is law of the case. We think it is binding on the Court. And we think it is binding on future Eleventh Circuit panels as well because that is what the case law that we have found says.

And the preliminary injunction stage actually

involves evidence. It involves the weighing of evidence. Whereas, this stage, we're only trying to show that we have evidence. So the preliminary injunction stage is arguably a more rigorous standard to meet than the one that we're faced with in this motion. So we believe organizational standing should be satisfied.

Those are the primary points I wanted to make. But I wanted to go through just a couple of points made by Mr. Tyson and address them.

THE COURT: All right.

MR. McGUIRE: First, he -- I just can't let this one go. He made an issue of the fact that this is the only case about voting machines that is still outstanding. And just for the record, this voting case predated all the other voting cases, as he well knows.

So we're not actually proceeding along with the same kind of plaintiffs that were bringing those cases, with the same interests that motivated those plaintiffs. We had problems with the DRE voting system long before the 2020 election came up. And our issues with the BMD system were unrelated to the 2020 election specifically. They are about the constitutionality of this voting system.

Bruce is going to address the mootness issue and our position on that.

On the issue of whether one party is enough,

obviously we believe we have standing. The issue under Article III is whether the Court has power to hear a case or controversy. And if our claims are co-extensive with claims of the other plaintiffs' groups, then there is a case of controversy. And the one plaintiff rule we believe should span the groups. And our standing should be imputed to the other group as well.

And we believe that our case is actually somewhat broader than theirs. We're actually challenging a few more things than they are. So the claims they are making I think are encompassed within the claims that we already have standing for. So we think that they should be good.

Mr. Tyson made the point that there are no state law claims listed in the complaint. And that is true. I know one of the questions from the Court concerned the issues of HAVA and issues of the Georgia state law.

Those are relevant to standing because they are sources of a legally protected interest. So HAVA is the source of a legally protected interest. The Georgia state constitutional right to voting in secrecy is the source of a legally protected interest. Georgia statute is to guarantee absolute secrecy in voting. Those all provide sources of legally protected interests that are invaded by this voting system for purposes of standing.

Now, do we have a HAVA claim? No. Do we need to

prevail on a HAVA claim? No. But we do have the interest. The interest is invaded. There is causation and redressability. So it is important from the perspective that it gives us standing to make our larger claims.

Mr. Tyson also talked about how our injuries are confined to really a fear of hacking or a fear of sort of some future exploit that might happen with the voting system. And just to reiterate, that is certainly a consideration that is -- that should be weighed on the merits.

But -- and if we were to take the hard road to find standing, we could argue that that is actually a source of injury for us that gives us standing. But we have already got standing based on lots of the other more simple things. The issue --

THE COURT: Well, you could have standing but not have a viable claim, couldn't you?

MR. McGUIRE: I mean, it is possible. The merits are distinct from standing certainly.

We believe that certainly at this stage we have put in enough evidence that we would survive on the merits for summary judgment. And Bruce will address that.

But the fear of hacking is -- it has to be kept in mind. That is not necessary for us to have standing. The fact that -- you don't have to find that there has been an exploit or even that there is a threat of exploit that is sufficiently

imminent and substantial to give us an injury in order for us to have standing. Because we already have it for lots of other reasons.

And I would also just make the practical point as well because Your Honor asked the question about whether there was any evidence of hacking or malware at this point after the Coffee County breach. I'm not prepared to say there is evidence. But I would respectfully remind the Court that in the earlier phases of this case we heard copious expert testimony about how the threats to voting systems that we're faced with are brought by very sophisticated actors and those actors are most likely to not leave evidence of hacks.

So the fact that there isn't something is -- I mean, that is equally likely to be seen if there has been a hack as if there hasn't been a hack. Because the people who are going to be the most dangerous and the biggest threats to exploiting vulnerabilities in the voting system are the ones who won't leave signs that they have been in there. Because the point is to change an election without letting people know it has happened.

Unless the Court has any specific questions for me, I think that is it for standing.

THE COURT: Thank you very much.

MR. McGUIRE: Thank you, Your Honor.

MR. TYSON: I have checked with counsel for Fulton

County. And they have indicated that I can go ahead and close the standing portion, if that is all right.

THE COURT: You're going to be quick? Because I'm looking at the clock. Although I'm happy to go past 5:00, I don't want to be here after 6:00. That's for sure.

MR. TYSON: Absolutely. I'll do my best to wrap this up quickly. Your Honor, Bryan Tyson for the State defendants.

So I think a couple of points are important here. First is: At this stage in the case, we are entitled by Rule 56 to point to the lack of evidence in favor of the claims and have that be -- consider the plaintiffs' burden that is to come forward with admissible evidence.

So at this stage, if there is an absence of evidence on a point, it is their burden to come forward with showing something that is still a triable fact.

And the plaintiffs are correct that they can show standing through a threatened future injury. But I think it is important to look at what *Muransky* says about exactly that point. And so at Page 927 in Muransky, the Eleventh Circuit said, we recognize that material risk of harm is somewhat an indefinite term. One thing is definite, however, whatever material may mean, conceivable and trifling are not on the list. The court went on to say, there must be something more than a minor or theoretical risk and the formulation describe it as a significant or substantial risk, that they are

consistent in recognizing a high standard for the risk of harm analysis in a robust role in assessing that risk.

And also we were criticized for our quote about the some evidence out of the *Muransky* decision. That actually was a mis-cite to the *Tsao* case, which at Page 1344 says, however, without specific evidence of some misuse of class members' data, a named plaintiff's burden to plausibly plead factual allegations sufficient to show the threatened harm of future identity theft was certainly impending -- or there was a substantial risk -- would be difficult to meet.

So, again, I think that we come back to, at the end of the day, the plaintiffs have to show something more than just this could conceivably happen, this might happen.

Ultimately at the end of the day, while plaintiffs say there are, you know, many disputed facts in this case -- and, of course, there are -- very few of them though are material for the consideration for this Court to actually consider on the issue.

And so I would just point the Court back to our slide that we put up previously on this question of what are the undisputed facts as it relates to standing. What we have heard from the plaintiffs in terms of that claim is that the undisputed -- the facts that they are alleging as an injury is a verifiability of their ballots. Can they verify their ballots?

And ultimately at the end of the day, as this Court has pointed out, while you may be able to look at a ballot, no one knows how that ballot is being considered by a scanner, whether it is a hand-marked paper ballot or whether it is something else, whether it is a BMD-marked ballot.

What the undisputed facts before this Court show is that the plaintiffs are afraid of voting on an unverifiable system, that they have no knowledge of any manipulation that led to a change in election results, that they agree that hand-marked paper ballots have risks.

And so at the end of the day, where we end up on standing is the plaintiffs have a policy disagreement with the State of Georgia in terms of how we approach voting in the state. They are trying to convert what is their policy disagreement, a generalized grievance, into an individualized harm.

But what the Court heard consistently is that there is no individual harm there; that every Georgia voter has the same potential injury as alleged by the plaintiffs, which is they can't look at their ballot and see what their ballot says.

A couple of other points, Your Honor. There was some discussion on the one plaintiff rule about the *Crawford* case. In *Crawford*, obviously there was one footnote that referenced that issue. It was a photo ID case. And the issue was whether the court could hear -- the Supreme Court could hear the

appeal. So not directly on point for this.

The *Martin v. Kemp* case that was cited by plaintiffs, I was part of that case. That was a case that involved preliminary injunctions only and was an issue specifically relating to the processing of absentee ballots before the 2018 election.

I think the key is, while the Curling plaintiffs say their relief is similar, I think as we get into the merits, we are going to see the relief is very different. Coalition plaintiffs now have claims where they don't want the scanners used -- the precinct scanners as it currently stands. That is distinct from the Coalition plaintiffs. There is a lot of divergence on those points in terms of what is being sought.

So kind of their fallback position for the Curling plaintiffs is, well, we have to go look at the merits to determine what the ultimate result is on standing. And at summary judgment, this Court has to determine have the plaintiffs come forward with admissible evidence that shows they have a legally cognizable injury that is traceable to the State defendants so that this case can continue.

And that is the threshold showing that we have to get to before we can get to the merits. And the plaintiffs have had every opportunity to do that. What they have presented in terms of the undisputed facts, the facts they haven't disputed in our statement of material facts, is enough to demonstrate

there is no such injury.

So at the end of the day, Your Honor, this is a generalized grievance. There is no basis why this case should be considered differently for Mr. Wood. And as you recall, Mr. Wood in the *Wood* -- the second appeal in the Eleventh Circuit, one of the allegations Mr. Wood made was that Hugo Chavez had in the past hacked elections using Dominion equipment and therefore he had a foreseeable risk of harm.

There is no such allegation here. And that was on a were his allegations sufficient in a complaint. Same as in *Tsao*. Same as in *Muransky*. Those were threshold motion to dismiss cases.

We're here on summary judgment. The evidentiary standard is higher. And the plaintiffs have failed to carry that burden. So we would ask for a judgment on the standing.

THE COURT: Thank you.

MR. TYSON: Your Honor, would you like to move to merits immediately?

THE COURT: Yes. I will just say in case -- so I don't lose the flow of this is that I would like you to think -- I mean, you are welcome to say anything you want while during the argument. But when you-all go back to your respective offices or homes -- I know this is sort of an arbitrary way of saying something.

But if there are ten specific documents you think

that are the most important on the merits or on standing but -- and particularly portions of declarations that might at least focus us very specifically on the evidence that -- we're going to read everything. But this is sort of like the 10 hits that you think are the most revealing -- thank you -- or 20 when we're talking about both.

MR. MILLER: Careful what you wish for with 20.

THE COURT: I know. Well, ten documents, ten declarations or portions of depositions that you think carries the day.

MR. McGUIRE: Your Honor, how quickly would you like us to submit that?

THE COURT: Well, by Friday would be good. I would like to be able to talk about them a little bit with my law clerks before I'm basically consumed on something else and gone.

If I could have them by Friday morning, that would be great. If you can't, you can't. I mean, everyone has worked a lot. So I don't need to have you going crazy. We're not going to have an order obviously out right away. That is fine if you can't do that. Just -- then between yourselves agree what the date is. Let's not have it past Tuesday.

MR. MILLER: Thank you, Your Honor.

As Mr. Tyson pointed out and argued for us, the State defendants contend that plaintiffs continue to --

(There was a brief pause in the proceedings.)

MR. MILLER: Your Honor, as Mr. Tyson pointed out, the State defendants continue to maintain that the plaintiffs lack standing to press their claims. But even if they did have standing to continue on the claims, they fail on the merits for at least three reasons.

The first of which being the plaintiffs have not identified a burden on the right to vote at all. And to the extent they have identified a burden on the right, that burden is minimal and ordinary as a matter of law.

Second, assuming the evidence demonstrates some burden in this case, the alleged burdens are not proximately caused or not tied to the actions of the State defendants. At best, they flow indirectly from the enforcement of the BMD system.

Third -- and, again, assuming that a burden on the right to vote has been identified, which flows directly from the enforcement of the BMD system, the State's justifications outweigh any burden imposed by the reasonable and nondiscriminatory requirement of the use of the Dominion BMD system.

Your Honor, at bottom, this case is about a remedy and search of a burden. No matter how unconnected that potential burden may be to the use of the Dominion BMD system, hand-marked paper ballots are the focus of what the plaintiffs

seek.

So setting the table just briefly, it is beyond dispute that the Constitution delegates time, place, and manner regulations and power to the states. Of course, this general grant of authority is intention with the individual and personal right to vote which may then be vindicated within the federal judiciary's constitutionally prescribed role.

So this leads to the necessary question of, what is the right to vote? And we know, of course, that the right to vote does not encompass the right to vote in any manner, that the right to vote is not absolute.

And I think as, in fact, was on one of the plaintiffs' slides earlier, in *Burdick*, the Supreme Court described that the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.

Of course, those two prongs recognize what essentially comes out of the *Anderson-Burdick* framework. But before we get there, I know the Court had a specific question on this, you know, whether there is a right -- or burden on the right to vote at all.

And cited to this passage from *Jacobson* -- if there is such a thing as PowerPoint school, I know this is something they tell you not to do. But I wanted to make sure we get the whole thing in here.

THE COURT: Thank you.

MR. MILLER: Most acutely, this list from *Jacobson* illustrates at least five different categories of cognizable burdens on the right to vote. Does the statute make it more difficult to vote? The first case citing to *Crawford* and *Common Cause*. That is just simply not the case here.

Second, does it make it more difficult to choose a candidate of choice?

Third, does it limit ballot access which thus interferes with a voter's ability to support their preferred candidate and associate for political means, or does it burden the rights of -- the associational rights of political parties themselves?

And, finally, the fifth issue is, does the alleged burden create some risk that votes will go uncounted or improperly counted, as described in *Wexler v. Anderson*, which is the case *Jacobson* relies upon here in this last highlight.

So in this context, Your Honor, only these five categories of these types of claims burdening the right to vote is the last category pointing to *Wexler*.

But another case also casts doubt on whether certain rules and regulations burden the right to vote at all. In *New Georgia Project*, the plaintiffs challenged the absentee ballot receipt deadline under *Anderson-Burdick*. And there in evaluating and weighing the burden imposed by the deadline, the

court noted that a look at the evidence shows that Georgia's election day deadline does not implicate the right to vote at all. And it then went on to note how this mitigates the chances voters would be unable to cast their ballots.

So put another way, what *New Georgia Project* is looking at here is the chances that voters would be unable to participate in the electoral process, the first aspect of what *Burdick* describes to us as the right to vote, and recognizing that this process must necessarily be structured.

Now, I recognize -- I do want to address briefly -- I know the Court had a couple of questions about *New Georgia Project*. And it is indeed a stay-panel opinion. But what has happened since the issuance of this stay-panel opinion is that it has been repeatedly cited in multiple merits panels opinions for the crux of the issues that the State defendants posit for them.

It was cited on the Eleventh Circuit's order in the appeal in this case, as to weighing of the burdens, what is a severe burden and what is not. But even setting that aside -- you know, it is almost like a selective incorporation of sorts.

But setting that aside, at minimum the Eleventh Circuit's stay-panel opinion is certainly persuasive authority on a district court, which is the same conclusion that Judge Jones came to in the *Fair Fight v. Raffensperger* case where he relied upon it in his final order.

Setting that aside -- you know, nevertheless despite *New Georgia Project* questioning as to whether the election day deadline in that matter implicated the right to vote at all, they went ahead and weighed the burdens under *Anderson-Burdick*. So taken together with *Jacobson*, we know that not all laws which regulate elections implicate the right to vote.

And, two, to the extent that the context of the overall electoral scheme on that right is being implicated, that itself mitigates the alleged burden imposed. So that is the example of *New Georgia Project* where it is reviewing the manners in which you can return an absentee ballot, the time at which you get an absentee ballot, that you can request it early enough, and that early voting in person remains available at any point in time, and that you can show up on election day and cancel your absentee ballot.

Of course, absentee ballots are not squarely at issue in this case. But the point here is that, in evaluating the burden, the Court has to look at the overall context of the electoral scheme.

Now, in addition to establishing that the challenged law implicates the right to vote, to prevail on such an action, the plaintiffs must also demonstrate an affirmative causal connection between the state law that allegedly deprives the constitutional right under Section 1983 and the burden imposed.

So -- and in some contexts, you know, various

different courts have considered it in relation to the burden itself that is imposed on what is the character of the burden. In fact, in the appeal in this case, Section 1983 is not directly cited for the proposition. But the Eleventh Circuit recognized there has got to be some tie between the alleged burden imposed and the allegations and evidence that are before the Court when it is weighing the burden, character, and magnitude thereof.

So in the context of claims challenging the First and Fourteenth Amendment, of course, the *Anderson-Burdick* framework applies. This framework, as the Court is familiar with, weighs the character and magnitude of the burden that the state's ruling imposes against the state's interests which justify the law. If it is a severe burden, it must be narrowly tailored. But if it is reasonable and nondiscriminatory, then a state's regulatory interests were generally justified.

And to demonstrate anything above run-of-the-mill process regulations, necessarily the burden must rise above the mere inconvenience. There must be something real imposed, some real burden imposed. Because, otherwise, you would tie the hands of the state and render the constitutional grant to regulate times, places, and manner nugatory. It would be meaningless. Because at every point along the way, the federal judiciary would be able to step in and dictate whether a state law has been violated, for example.

So what is the challenged statute at issue? OCGA 21-2-300 provides that as a matter of law all equipment used for casting and counting votes in county, state, and federal elections shall be the same in each county in this state. And then it goes on to state in (a)(2) that as soon as possible, once the equipment is certified by the Secretary of State, elections shall be conducted with the use of scanning ballots marked by electronic ballot markers and tabulated by using ballot scanners for voting at the polls and for absentee ballots cast in person, i.e., in-person early voting.

And too big to fit on the slide here, but (a)(3) also provides -- and, you know, as a matter of law, we certainly don't dispute it -- that the equipment, once certified by the EAC, is furnished by the state with the option for the counties to purchase more.

So in this case where plaintiffs are seeking both a traditional injunction to prohibit enforcement of 21-2-300 and at the same time a mandatory injunction that the replacement for 21-2-300 must be hand-marked paper ballots, this is at bottom a facial challenge and not an as-applied challenge. There is no allegation that because the statute is applied to a particular person and that person's particular set of circumstances that that person is -- you know, the burden is imposed by that manner.

To put it more bluntly, the issue here is that there

has been no testimony or evidence in the record that there is a system which would resolve plaintiffs' burden that complies with this statutory scheme.

So in sum, Your Honor, the legal framework here is a burden on the right to participate in the process that is not one imposed by reasonable non-discriminatory restriction and which burden is proximately caused by the State defendants under the color of state law.

So here at this point, I do want to briefly touch on -- I know Your Honor posed the question about the equal protection claims. The way that the Coalition or -- Curling and Coalition -- Coalition to a somewhat lesser extent -- claims are pleaded seem to indicate to me at least that it is a First and Fourteenth Amendment combined challenge, which is of the type that *Lee* distinguishes from the traditional equal protection challenge.

I think the only real substantive difference is that rather than establishing the kind of count as a matter of law, Fourteenth Amendment, First Amendment, Coalition's claim just simply states in the pleading that it infringes upon the fundamental right or burdens the fundamental right to vote.

At this juncture, Your Honor, as much as I would prefer that we have the traditional equal protection standard because there has been no discriminatory intent alleged, what I will not venture to do is lead this Court down a path for a

problem down the road.

So, nonetheless, the issue at hand here is, what is the burden? Of course, before it can be weighed, a burden must be identified.

If we look at the deposition testimony, the Curling plaintiffs for their part testified to a variety of concerns.

Mr. Schoenberg generally testified under oath that the source of his harm was that, every time I vote on a system that is not reasonably secure, I can't know that I have participated in the democratic process in a meaningful way.

Ms. Price explained that not having voter verification on the Dominion BMD system is her barrier to her ability to vote.

And Ms. Curling testified at least initially that she viewed her concerns as resolved so long as risk-limiting audits as prescribed by Dr. Stark were in place. Though that testimony was later revised in the errata sheet to state that it would not be resolved because the QR code still exists.

Coalition plaintiffs likewise struggle to identify their burden imposed by the BMD system.

Mr. Digges explained his harm is being forced to use the absentee ballot system.

And somewhat consistently, Ms. Digges explained that she has never voted on a BMD and never intends to.

Mr. Davis compared the complaint of a lack of

integrity by audit to independently verify that such is the case.

And Ms. Missett explained that her concerns were not about whether malware had ever been introduced to the BMD system but rather the possibility, meaning that that could happen.

And then at the motion to dismiss stage, this Court identified three alleged burdens it viewed as common to all plaintiffs based upon the claims as pled.

The first of which is the susceptibility to cybersecurity risks and manipulation.

The second here being the verifiability question of the paper ballot produced by the BMD system.

And the third being concerns over auditability. In other words, as stated here at Doc 751, that the BMD system is incapable of being meaningfully audited.

Now, the Court also pointed to three additional alleged burdens that are viewed as unique to the Coalition plaintiffs. The only one of which that remains at issue here is the allegations regarding ballot secrecy, the others having been dismissed or abandoned or otherwise mooted along the way. For example, the third there being implementation and time to conduct elections.

So let's look at these three alleged burdens. Cybersecurity risks and manipulation. The undisputed facts are

that all computers are susceptible to hacking and that both the Dominion BMD system and plaintiffs' preferred hand-marked paper ballot system utilized computers.

No one disputes that all balloting systems have cybersecurity and manipulation risks. But even still, these are only risks. And, again, despite reviewing a sampling of memory cards from the DREs and the DREs themselves, along with the forensic images of Coffee County election equipment and the Dominion BMD separate and apart from that, no evidence of malicious code or ballot manipulation has been produced.

And pertinent here, when considering the risk, there is also no evidence that self-propagating and adaptable malware such that this malware or malicious code moves between machines and that can continue to be effective on multiple elections down the road even exists. Dr. Appel testified he had never seen such a thing.

So under the law under these facts then, there is no deprivation owing to this alleged burden because nothing has yet occurred. Moreover, the lack of imminence here is not only particularly problematic for Article III purposes, but it is so too on the merits to the extent a claim can be based on such a risk of future harm.

And even still, the only state action involved in this context, which is again 21-2-300, which plaintiffs seek to enjoin, is requiring the use of the Dominion BMD system.

Moving on to verifiability, it is important to note here with respect to verifiability that it is this alleged burden that the Court found imminence for at the motion to dismiss stage. In other words, that it was certainly impending that voters who were going -- or excuse me. Let me back up -- found it was certainly impending at the motion to dismiss stage reasoning so because, quote, plaintiffs intend to vote in every person -- in person in each upcoming election in Georgia. That is Doc 751 at 38. That was what was pleaded.

And the State defendants do not dispute that the ballot has a QR code. This is the QR code and the ballot summary on the ballot. Now, whether a voter chooses to verify the ballot's printed text remains the voter's choice. But, nonetheless, voters are reminded to review their ballots by both poll workers and on the BMD itself when the ballot prints.

THE COURT: Right. But we have gone over that many times. It is true you are reminded. But if you can't -- it would be one thing -- you know, just as a voter, we all know that basically once you conclude your ballot and you say it is done, you print it, and then you don't get to go back and look at the screen because -- so you are basically -- there is a memory test dimension of it because of the fact that you don't have what the choices are or what the questions were or what the offices were, as you would in other circumstances.

MR. MILLER: So I think the only distinction there

would be that, if I'm hearing the Court correctly -- I want to make sure I understand the question. But with an absentee ballot, it would show the selections you did not pick?

THE COURT: When I sneezed, I stopped hearing you.

MR. MILLER: Just so I understand the Court's question correctly is that the memory test aspect is that, in essence, that an absentee ballot would show you the selections you did not pick in addition to ones that you did bubble in? Am I understanding that correctly?

THE COURT: Well, you could say it that way. But you could say it also that -- basically go back to the question -- what we discussed at the beginning of the hearing.

It could print out just as easily -- and perhaps it is not so easily. But it is -- that the actual ballot choices as they appear prints out and that you are able to see what you selected and what was the position again and you look it over. Because you definitely may not remember who you voted for for dog catcher.

It doesn't make any -- maybe it is a party position. Maybe you're not really a strict party voter. I have no idea. But I think that those are -- those are the issues at least that some of the expert testimony in other hearings went to.

MR. MILLER: Sure.

THE COURT: And affidavits that people don't tend to remember who they voted for.

Now, it doesn't mean that people will do it, as you well know. But that is --

MR. MILLER: So, Your Honor, three items to that point. The first of which is that -- and I don't have a copy of a ballot on the slide here. But I know the plaintiffs had one on their earlier slide.

But what the ballot itself demonstrates is each position, if it is no selection or reads no selection, and then your vote with each one with the party moniker behind it. And that comes out that you are reviewing as you take it to the scanner.

Now, Number 2, the important issue here is that this verifiability only matters if there is an action of a third party to do one of these vote hacks that has never happened in real life in the wild to switch the human readable text but not the QR code or to switch both the text and the QR code.

And third, Your Honor, and most importantly is that the Ninth Circuit held 20 years ago that the lack of a voter verifiable paper ballot simply does not constitute a severe burden on the right to vote. And that is *Weber v. Shelley*, 347 F.3d 1101. And in that case, they were upholding at that time the use of a DRE system.

And, Your Honor, one final point here is that, if the verifiability itself is the burden -- the actual burden imposed here, which I do not dispute with the Court that as far as the

Court's reasoning on the certainly impending matter, that this is the one that is certainly impending. They are getting a ballot that has a QR code and a printed summary. But that also still, you know, only matters each time the voter refuses to review the text and the third party manipulates it.

Next, Your Honor, under auditability, the facts here indicate that the 2020 hand count confirmed the outcome of the results of the Presidential election. The 2022 risk-limiting audit by the Secretary of State confirmed the correct outcome.

The plaintiffs offered no evidence of an inferior type of review of BMD ballots in an audit and no evidence that the audit failed to detect manipulation or confirmed an incorrect outcome, just that they maintain it could be the case.

But, Your Honor, this is *Wexler*. *Wexler* talked about differential procedures as related to DRE voting jurisdictions counties in Florida versus hand-marked paper ballot counties in Florida. The only difference here between *Wexler* is that there is not a different -- in that case, there was a facially different regulation that said, if you have an overvote on a hand-marked paper ballot, you're interpreting intent. If you have an overvote on a DRE system, then the DRE machine itself handles it.

There is no allegation here that the votes themselves are treated differently in any meaningful way by the statute or

law, whether it is on the counting of the votes or on the recounting of the votes or on the auditing of the votes.

And finally, Your Honor, and most, you know, importantly here, it is not even clear what is sought with respect to auditability. Dr. Stark contends that even a hand-marked paper ballot audit would be insufficient in Georgia. He does so based upon statutes and regulations he's not reviewed and an audit which he has never observed in one PowerPoint attached to his declaration, in which he cursorily skimmed over the process.

That being the case, Your Honor is correct as she ruled in the 2020 preliminary injunctions there is just nothing to do here with respect to auditing without determining that the Dominion BMD system itself is constitutionally insufficient without it.

But even if that is the case, the plaintiffs maintain that there is no audit that could audit the Dominion BMD system.

Now, a few additional items which the State defendants contend --

THE COURT: I guess that is a little different than *Wexler* -- *Wexler* where the Florida regulations provide that if a manual recount becomes necessary the canvassing board shall order the printing of one official copy of the ballot image report from each touchscreen voting machine that has recorded

undervotes for the affected race. So that was a different way that they went about it.

And they -- and then they had further review processes about how -- how an audit was to be done for each of the variety of ways that people could vote in Florida. But --

MR. MILLER: Yes, Your Honor. I didn't mean to cut you off.

THE COURT: All I'm trying to say is that I think it circles back to my question in the beginning about the status of a process that did not use the QR code. But that is -- because there are other -- there are more ways to meaningfully audit when you actually have a printout of what people have seen that they knew that they voted on that is not produced by a QR code. Because most of the testimony from both the expert for the plaintiffs as well as your expert who was the expert on -- particularly also on disability issues faced by -- faced by voters is that -- in the voting process was that there was typically otherwise a low rate of people looking at their ballots.

And yes, the people basically have to own responsibility for that. But it still is -- from the perspective of the state assuring a functional and reliable system, it is something that the state -- it would seem would have a very strong interest in because it is a computerized system with all sorts of other risks that we know every year

more about in our world.

MR. MILLER: Sure. And I will grant that *Wexler* is an imperfect analogy because *Wexler* is dealing with recount procedures as opposed to audit procedures. But that is an important distinction also to recognize when we are here talking about whether a lack of auditability renders a voting system unconstitutionally insecure.

The simple fact of the matter is that no court in the United States has ever ruled that audits must be had; otherwise, you cannot use electronic machines or hand-marked paper ballots, whatever variety of types of votes.

And by the same token, there are still -- as last I recall, the entire state of Louisiana still utilizes DREs. So the logical conclusion there is that, you know, that also has to go away.

So, Your Honor, these are issues that become an issue of what is a material fact. There is nothing material as to this auditability question. We don't doubt that there is a dispute. Again, Dr. Stark is more than critical of every single audit principle that the State deploys. But he also says that there is no audit you can do to a BMD system. So there is no reason for us to need to discuss it here.

THE COURT: Wouldn't you say -- I'm moving off track. But if you argue that, then you would say the State was silly to spend any resources in auditing the results of the

Presidential election where every vote was purportedly at least counted.

I don't know. I don't think -- I think there are reasons why you have to have audits, and there are reasons -- and I'm not just saying that personally. And I think that is also reflected in why you have -- when you have run-off votes, why you end up having sometimes to look at every single vote.

MR. MILLER: Sure. And I certainly will grant Your Honor that there are strong reasons to deploy audits, which the State does, but which at bottom that decision to deploy audits is a policy decision that the Georgia legislature has made.

Your Honor, with respect to secret ballots and the Dominion BMD system, this is a claim that does not go to the, you know, heart of the initial claims but has kind of been in and out of this case at various points.

But as Your Honor addressed it in the order on the scanner remedy, there has been no evidence of any plaintiff or voter generally claiming disclosure of a ballot or nowhere that such disclosure led to a chilling effect, no evidence of any voter, poll watcher, or election worker going to the great lengths that plaintiff suggests that would reveal a secret ballot.

And as Your Honor noted, the State Election Board promulgated regulations concerning the BMD layout. And at the end of the day, if state law is not being followed, the State

Election Board can seek civil enforcement as to the BMD machine layout and screens and so forth.

As to the extent that there is a state law claim, that doesn't in and of itself confer federal jurisdiction. They are happy to go to Fulton County Superior Court and state a claim for declaratory relief that the system violated ballot secrecy. You know, if that is the case, that is something that the Fulton County Superior Court can handle or, frankly, another superior court in the state.

And lastly, Your Honor, two items that -- or another item that we have maintained is, you know, not a part of the case but given Your Honor's questions prior to the hearing we wanted to address just simply State defendants' position as to the Poll Pad and the paper pollbook backups.

No material facts have changed since the Eleventh Circuit's decision last fall. There remains no evidence of any voter unable to vote -- unable to be located in either the backup pollbook or the Poll Pad itself. That is something the Eleventh Circuit recognized on appeal is that there wasn't evidence tying the alleged burden, potential lines and so forth, to the alleged violation. But there also was not necessarily evidence that the remedy would resolve the issue.

And so, Your Honor, at this point, this is simply a matter where nothing has changed. And we believe the Eleventh Circuit's opinion controls.

So that leads us, Your Honor, to weighing the burden. So, again, from the beginning, do these items implicate and burden the right to vote at all? Only possibly to the extent it creates the risk that some votes will go uncounted or be improperly counted per *Jacobson* citing to *Wexler*. And ultimately in *Wexler*, the issue was whether the statute was justified in applying the different recount rules, as we discussed before. And the court thereto questioned whether the voters in touchscreen jurisdictions were burdened at all by the difference in procedures there.

So on that equal protection claim in that case applying *Anderson-Burdick*, the Court found that the remote possibility of allegedly inferior review due to the different recount procedures was reasonable and justified.

And on due process, the Court in short order determined that whatever the burden is it is likewise justified. But the alleged burden of particular types of auditability does not impose this nor do the Poll Pads or the secret ballot allegations, for that matter. It is only potentially the verifiability and the alleged risks.

But, again, the alleged risk requires that there is some additional step by a third-party invidious actor that comes in to manipulate or otherwise inject malicious code into the system.

And in *Weber*, the Court found that the touchscreen

voting systems remedy a number of potential problems like undervotes, overvotes, et cetera. And in this case -- or in that case, you know, albeit at the hypothetical price of programming, worms, and malware, as the Court noted in -- the Ninth Circuit noted in that case, that it does not leave the voters without any protection from fraud or means of verifying votes or any way to audit or recount.

And the verifying votes is quite important here as to this verifiability issue. That the Ninth Circuit went that far on -- that was a DRE system. That is not a system that prints out a paper ballot that is then actually scanned. It is not a system that prints out a voter verifiable paper audit trail or VVPAT that is simply a receipt that is never scanned. It is just a DRE. And even still verifiability is -- you know, any risks of this verifiability or the alleged security risks can be mitigated because plaintiffs are free to utilize absentee ballots -- or hand-marked paper ballots as absentee voters.

Now, this gets into the question where the Court had a couple of particular questions as to whether there were discrete claims intended to be challenged as to absentee ballots. And as a preliminary issue, State defendants disagree that there is any ability for them to challenge the absentee ballot scheme at this juncture in the case. It is not in their complaint. It is well past time for amended complaints. And the issue of the burden imposed has to do with the Dominion BMD

system, not the hand-marked paper ballots conducted by absentees.

But even still, plaintiffs cannot go to hypothetical future problems with absentees, which are not certain to occur and which would be the results of, say, a county official who neglects to send out a ballot in a timely manner. That is a matter of law that was decided in *Fair Fight Action* as to this, you know, who is in charge of absentee ballot administration. And this court also noted it in the *Georgia Shift* case as to the administration of absentee ballots is a county board function. So it cannot be both ways. Both on the alleged burden, there has to be some relation to what the State is doing. But likewise on the -- what now is kind of the alternatives create the burden, there still has to be some relation to what the State is doing. And, frankly, that burden is not even what they allege.

In their complaints, the plaintiffs allege that absentee ballots are treated as a preferred system of voting. This is so because they point to the verifiability, the same things that we discussed. If it is the preferred system of voting, then the plaintiffs are free to join that preferred class of voters that they see as, you know, being the case.

That was what the Eleventh Circuit told Lin Wood. That was what the Second Circuit told some other election folks in *Bognet*. And so -- excuse me -- the Third Circuit. And that

remains the case. Nobody is forcing anybody to vote on any particular kind of system.

And finally, Your Honor, given this set of facts, if there is a burden imposed at all, it is a minimal nondiscriminatory, reasonable burden and the state's justifications outweigh any burden.

In this case, it is undisputed that Dominion BMDs avoid the problem of overvotes. Dominion BMDs can and have been subject to risk-limiting audits, though admittedly not of the type that Dr. Stark would prefer to have.

But, again, it remains unclear what type is possible that he would prefer to have in the BMD system. And the Dominion BMD provides an equal means for disabled voters to exercise their right to vote too.

The Court had a question about this in the context of ADA. I want to be clear as to what the State is saying here. It is not that a hand-marked paper ballot jurisdiction that offers BMDs as a -- essentially akin to a reasonable accommodation -- not that that in and of itself creates a problem.

It is because in order to get to that in this case the Court would have to determine that the BMDs themselves are so constitutionally deficient that they cannot be used except for by disabled voters.

So, in other words, when we talk about who is forcing

anybody to vote in a particular manner, that is the closest we come to forcing to vote in a particular manner because it is the type of accessible voting that is available.

I want to be clear about the context of that. It is not just that it always is. It is that the logical step to get there in this case imposes that issue.

And finally, Your Honor, I'll just end with a word on trial. There have been a lot of discussions about alleged facts and what is disputed.

But to be clear, the State's position is that the vast majority of facts are simply immaterial to whether the facial challenge unconstitutionally -- the Dominion BMD system unconstitutionally burdens the right to vote.

And you heard earlier on the standing section that phrases such as properly counted, reasonably reliable -- I think the last one I heard was constitutionally reasonably reliable manner of a voting person.

But in this case, the plaintiffs' experts have refused to quantify any risk of various voting systems. Given that, what on earth would we be going to trial on?

And the plaintiffs cannot point to that simply burden is a dispute of material fact. You know, whether the burden exists, that is a legal test that the Court applies. The factual matter is simply what is the burden or what is the allegation. The character and magnitude is something that the

Court determines. You know, same type of setting as if sitting on a jury trial. A factual dispute is what is the type of alleged burden the Court determines. Given the circumstance of facts, what is the character and magnitude? But here there is no dispute as to what the alleged burden is. At least I don't believe so. Although, I should caveat. I think at one point this verification scheme was disclaimed in plaintiffs' briefing. And so I'm interested to hear if I have missed the mark as to what the alleged burden is.

But at bottom, we would simply be going to trial on a policy choice. And that is not a trial that is subject to the federal judiciary's constitutionally permissible actions. That is a legislative hearing that has already occurred on multiple occasions down the street at the capitol.

So, Your Honor, with that, I will wrap up. I know the Court is cognizant on time. But if there are any additional questions, I'm happy to answer them.

THE COURT: Thank you very much. I think we should take a five-minute break.

And let me ask one thing though before we do that. It is really not clear to me at this juncture whether the nature of the claims that the plaintiffs really have against Fulton County or what -- because it seems like you really -- that the plaintiffs are now very focused on the systemic issues. And there were also sorts of -- during the course of

the elections held before, there were many administrative issues.

But I'm -- is Fulton County an actual necessary party is one thing ultimately at least the plaintiffs have to address. I mean, because obviously none of the other counties were deemed so. And maybe Fulton County was necessary when you were trying to get an injunction and you thought that the -- you had a different -- had magnified concerns about the administration of the elections or thought that there was very valuable information that Fulton County could provide.

I'm not -- you know, there are many different possibilities, I know. And I take that all in good faith. But I just want to know now do you think that they are a necessary party and are you -- or not.

But let's take a five-minute break so I can get some air into my brain.

COURTROOM SECURITY OFFICER: All rise.

(A brief break was taken at 4:31 PM.)

MR. McGUIRE: Your Honor, Rob McGuire for Coalition plaintiffs. I just wanted to answer your question that you asked at the very end.

We touched base internally. And our view about Fulton County is that they are not technically a necessary party in the Rule 19 sense. But since we can obtain relief through an order just against them, we believe that they should

remain in the lawsuit. And for that reason, we wouldn't be willing to let them out voluntarily for that reason.

THE COURT: All right. Maybe I don't -- you are willing to let them out voluntarily because you -- or you are not willing to let them out voluntarily?

MR. McGUIRE: No. So we don't think that they were required by the rules to be joined as a necessary party under Rule 19 at the beginning. But we do believe that they are an appropriate party. Because if we get an order just against them and not against the Secretary, we can still get most of the relief that we're looking for. So we think that our claims against them are viable, and we want to pursue them.

If, on the other hand, we let them out, then it is possible that we wouldn't be able to get some relief that we would be able to get if they remained a party.

THE COURT: All right. Well, we'll follow up. Thank you.

Who is going next?

MR. CROSS: I am. I'm back. Sorry, Your Honor.

THE COURT: That is all right.

But I know this is kind of a blunt question. But in light of the Eleventh Circuit's decisions in *Tsao* and *Muransky* in particular, can you provide any information that is more concrete regarding the scope of the risk that you say was created, for instance, by the breach in Coffee County and the

posting?

I mean, obviously for whatever reasons, including maybe perhaps fraud analysis, the 16 percent figure wasn't deemed very impressive to the circuit in *Tsao*, I guess it was. I don't know how that was calculated. So I'm just putting that aside for now because there were many different -- but what -- is there any testimony, is there any evidence that tells us what this -- kind of concretely what the scope of the risk is?

MR. CROSS: Yes, Your Honor. The only reason I was a little bit struggling to answer is because it is a lot of evidence. It is not one particular thing.

So we would point you to Dr. Halderman's 100-page report. We would point you to the CISA advisory, the testimony of Theresa Payton, who is the founder of Fortalice, which Merritt Beaver testified still to this day serves in the capacity as the chief information security officer for the Secretary's office, who unlike *Tsao* where the evidence was that the risk that was contemplated was unlikely. Theresa Payton said this will happen. It is not if. It will happen. This is their chief information security officer -- her organization. She's the one that they rely on to assess the security of their IT structure.

Again, we have got CISA saying the opposite of the GAO. CISA is coming in and saying all these vulnerabilities that Dr. Halderman has found are very serious. And they tell

the states you need to mitigate them as soon as possible.

We're now almost a year later, and the State has done nothing to do that. So that is just a piece of it. You know, we would also point to things like the Coffee County breach -- right? -- that shows -- and to take a step back for a moment, Your Honor, it is important to think about how this case has evolved in the way that I started with. And here is why.

Remember, their defense to Dr. Halderman's report was it is pie in the sky academic nonsense. Secretary Raffensperger literally went on a media tour saying this is all nonsense, no one could ever get access to the equipment or to the voting system in the way that Dr. Halderman did, this is all artificial, and it is saying the sky is falling when it is not.

We knew that that was not true when he said it. And, in fact, Merritt Beaver testified that what Dr. Halderman did is exactly how you do a cybersecurity assessment. Dr. Gilbert said if he was going to have a cybersecurity assessment done of a voting machine he would ask Alex Halderman and Andrew Appel.

But then we get to Coffee County, which just drives a stake through the heart of the only defense they have on the merits of this case. Despite everything that Mr. Miller had to say today -- by the way, I will just say we're at a disadvantage to respond because Mr. Miller had an argument that does not appear in any of their briefing. Lots of citations to

statements of facts and other things, none of that is in their briefing.

But putting that aside, that was their defense for years was yes, the system is vulnerable. Yes, these exist. But it is not a problem. CISA says it is a serious problem. Act on it now. They do nothing.

And now we know that you can get access to the system, and it just happened again. Something like a dozen electronic pollbooks were just taken out of a county. And so still to this day, we are so far afield from what is in *Tsao* where what the Court points out on the pled allegations is, one, they were able to immediately mitigate any harm because they canceled their credit cards.

They also are a consumer. They never have to go back and use that system that was breached ever again. They have that as a consumer choice to walk away from it. As a voter, you don't. You have to vote in this system if you want to vote in person.

And, again, it is -- how we think about a consumer breach is very different than how we should think about the breach of a voting system because of the Supreme Court's emphasis time and time again as to how important that is to the democracy and not just to the individual impact on a voter.

THE COURT: Well, again, I don't -- I'm just looking for where we got that 16 percent. Is that -- you are saying

that was the GAO?

MR. CROSS: I don't remember -- what -- my memory is that what really drove the result in *Tsao* was the GAO report saying that even -- two things: One, that the type of information that was breached is not the type of information that enables identity theft. That is not our case. The information that was breached here is exactly the information needed to hack and compromise votes. That is exactly what Merritt Beaver testified to. He said this software is the roadmap for hackers to hack an election. So that is point one.

Point two is GAO said, even with -- even if you had the type of information that would be -- that could lead to identity theft, it is just so unlikely because it never happens.

And here, Your Honor, we have CISA coming in and saying these vulnerabilities are very serious. They could be exploited, and it is so important, that the risk of exploitation is so high, that you need to mitigate them now. That was in June of last year.

So we're just in a very, very different posture. And, again, *Tsao* had a handful of allegations in a complaint that the Court was looking at.

Here, we have amassed reams of evidence from the leading election security experts. All of whom again -- the last thing I'll say on this, Your Honor. Again, there the GAO

is saying it is not a big deal. The State's own election security experts keep agreeing with us.

Your Honor might recall in your 2019 injunction decision, you know, as I read that decision, Dr. Shamos' testimony was one of the pivotal things Your Honor relied on, that even Dr. Shamos again, their own expert, said, don't use this system. You haven't done all of these things that needed to get done. So you shouldn't be using it. That is where we are now.

I mean, it is difficult to comprehend a state defending a voting system and saying it meets the minimal muster for constitutional right to vote when they cannot find even one expert that endorses it. How is that not dispositive? How does that not mean that we get summary judgment?

If you literally can't find one expert to say that this system is okay, that it works, and we can trust it, then that should be the end of the analysis in favor for us. At the very least, it creates a fact dispute to resolve at trial.

Juan Gilbert is literally creating a new BMD because he acknowledges this one is not reliable. That is what is written in his patent.

Again, Ben Adida says you need to use hand-marked paper ballots with one BMD for the folks who need it.

THE COURT: All right. Well, just going back to what my question was -- first of all, I found the passage, and I

think it is more -- the GAO report was something different quite than I had seen it. It just simply said that GAO reviewed the 24 largest data breaches in the consumer area between January 2000 and June 2005 and found that only 4 of the 24 breaches, roughly 16.66 percent, resulted in some form of identity theft and only three resulted in account theft or fraud. Given the low rate of accident theft -- excuse me -- of account theft, the GAO report simply does not support the conclusion that the breach here presented a substantial risk that *Tsao* would suffer unauthorized charges on his cards or account draining. We recognize that the GAO report is over a decade old, and it is possible that some breaches may present a greater risk of identity theft than others.

So then they go on even if we're going to put it aside. But -- so I want to, A, correct myself by just reading that into the record.

But does anyone in the record who was a witness one way or the other attempt to identify the magnitude of the risk in a quantitative sense?

MR. CROSS: In a numerical sense, the answer is no. My recollection is that Dr. Halderman was asked this in his deposition. And what he explained -- and I think Dr. Appel may have as well -- that is just not feasible in a cybersecurity world.

There is no numerical standard by which you can come

in and say, there is an X percent chance of this happening. What you do is what Dr. Halderman did; what Dr. Appel has done; what Mr. Skoglund has done; Dr. Springall working together with Dr. Halderman; and what CISA did, which is you look and see are there vulnerabilities. Then you assess the magnitude of those not in a quantitative sense but in a qualitative sense. Are they serious vulnerabilities? Could they be exploited? And if so, could they be exploited in a way that would affect votes and election outcomes?

If the answer to those questions is yes, then you have a serious problem. And you have to take measures to mitigate those vulnerabilities. And that is exactly what CISA says. That is why the CISA report is so powerful. It is the federal agency that is responsible for election security.

And while they were saying Halderman is wrong but they had no expert who disagreed with him and saying it didn't matter, CISA comes in finally and says, not only is he right, but he is right about how serious this is. It wasn't a report that came out and said, these are kind of small trivial things; deal with them if you choose; or when you have the resources, mitigate them. It says mitigate them as soon as possible.

And it emphasizes they can be exploited. Put that together with Theresa Payton saying it is going to happen. We are way beyond the world of *Tsao*.

The other thing I will also say --

THE COURT: All right. So I'll just say this. I mean, which is given developments in our nation and the legal system and the political system and the whole climate since 2019, is it really -- the type of relief you're looking for, is that something a court really is competent to require or handle?

MR. CROSS: Yes, Your Honor. And if you look -- if you look at the *Stewart v. Blackwell* case from the Sixth Circuit, for example, we would say it is almost directly on point. Right?

What the Court said there was they stopped the use of a particular voting system because they found a disproportionate number of undervotes and overvotes. The Court did not require the plaintiff to come in and say that my vote was not counted. It was enough to look at the impact more broadly and say, we've got a system here that we can see is just not reliable. And so -- and the Court said you can't use it.

So I would say there is absolutely precedent on point for this, Your Honor, for what we're asking and the science is solidly on our side.

The other thing I would also point to you that is another key difference from *Tsao*, Your Honor, if you have slide 44 in front of you -- again --

THE COURT: I don't think I have any slides right now

in front of me. But you mean -- like paper.

MR. CROSS: Oh, I'm sorry.

THE COURT: I can look --

MR. CROSS: There it is.

In *Tsao*, again, what the Court finds is that the allegations as pled make clear that there is no real risk of future harm. And part of that is because of the plaintiffs' ability to mitigate against that harm. Cancel the credit cards. Not use the breached service.

Here -- and so that plaintiff knew they had not been affected. They knew it with 100 percent certainty because they had canceled the credit card and they could see there were no fraudulent expenses and the information that was taken could not be used for identity theft.

This is testimony from Gabriel Sterling as the corporate representative, Your Honor. Do you know whether anyone has looked to see whether a back door was created to the EMS server or any other voting equipment through the folks that were there on January 2021 in Coffee County?

Testifying as the State, I would not have knowledge of that right now because, again, it has been handed over to the GBI.

The State is here today and has no idea whether there are nefarious actors that have a back door into their voting system to do whatever they please.

And we know that individuals were there day in and day out, five to eight hours a day, in January. We can see some of the tinkering they did. We can't see all of it because of the alterations Mr. Persinger made to the EMS server.

And then we get to the other question, Your Honor. Has your office considered whether those set of circumstances, coupled with the amount of time they spent there, the changes they made to the EMS server that we know of so far, whether any of that conveys to you that they actually were not just looking historically, meaning they were trying to figure out something in the past, but looking prospectively -- were they looking for ways to manipulate the elections going forward?

He says, but yes. To answer your question, we do take into account that could have happened. But the likelihood in our mind is probably not. He is guessing. And, again, that is kind of out of our hands until GBI finishes everything on the criminal side.

The Secretary of State's office is telling the public they don't have any idea whether this system works. That is not *Tsao*. The plaintiff in *Tsao* knew that he was protected, and the Eleventh Circuit emphasizes that. It is pivotal to their ruling.

Here, the Secretary of State says they have no idea if this system works and whether someone currently has a back door into it to do whatever they choose.

And picking up on Mr. Miller's argument about the *Jacobson* case, when you walk through what he highlighted, I think it drives home how strong our case is. He identified five types of burdens, and at least four of them are on the nose.

One is whether the conduct makes it more difficult for individuals to vote. We've been through that. We have been through it on the standing issue. It is certainly more difficult to vote in the BMD system when again you can't read a QR code, you can't verify your ballot, you have no idea --

THE COURT: It doesn't make it more difficult to vote. You might not like it, but it doesn't make it more difficult to vote.

MR. CROSS: I would respectfully disagree, Your Honor, because the act of voting is not just casting it. The act of voting is casting a vote and having reasonable confidence it will count. And so it makes it more difficult to have your voice heard because you have no idea of what is being heard as your voice.

Does that make sense, Your Honor?

THE COURT: It makes sense. But I would prefer to have some real authority for that proposition.

MR. CROSS: Understood. Understood. And, again, I do think the Sixth Circuit case --

THE COURT: *Stewart*?

MR. CROSS: -- is on point on that. It then goes on in *Jacobson*, the language Mr. Miller has highlighted, does it burden the ability to choose the candidate of their choice? It gets back to the verification point. I won't repeat that. They cannot verify that their candidate has been chosen.

Does it burden the associational rights of political parties by interfering with their ability to freely associate with voters and candidates of their choosing?

Their response is, well, it doesn't do that, and you can always vote by absentee. You can avoid this system. Well, that is that exact burden. If your choice is to vote absentee from the privacy of your home or wherever, then you are not getting to associate with your voters. And that is exactly what is being discussed here by being at the polls voting in person.

But then --

THE COURT: I'm sorry. What is being discussed here?

MR. CROSS: It says, nor does it burden the associational rights of political parties by interfering with their ability to freely associate with voters and candidates of their choice. Your Honor, the focus here is on political parties.

But I would extrapolate that for Your Honor that one of the things -- one of the burdens is the inability to vote in person and to associate with other voters, with other citizens,

and be part of that democratic process.

THE COURT: You are saying that that is in *Stewart*?

MR. CROSS: I'm saying that is in *Jacobson*.

THE COURT: In *Jacobson*?

MR. CROSS: Yes, Your Honor.

And the last one was, to state the obvious -- this is in the case -- the statute certainly does not create the risk that some votes will go uncounted or be improperly counted. That is the key issue in this case. And on that, that is a hotly contested fact dispute that has to be resolved at trial.

And, of course, *Jacobson* is saying that's exactly the type of burden that would rise to the level of rendering some sort of voting system or something that burdens the act of voting unconstitutional. And that is an issue that has to get resolved at trial.

I'm trying to just focus on specific points because I don't want to tell you what we've already got in the brief.

Couple of follow-up points here, Your Honor. Mr. Miller mentioned that malware to alter votes does not exist. I'm not sure where he is getting that from. Dr. Halderman details that.

(There was a brief pause in the proceedings.)

MR. CROSS: Dr. Halderman's report details that in depth. I won't repeat the specifics of it.

You asked a question that gets to something

Mr. Miller said. He talked about how voters review their ballot as they take it to the scanner. Your Honor has pointed out a number of times that the studies, including the state's own study, shows that that is not accurate.

You asked a question about whether that is self-inflicted. And to answer that question, Your Honor, we would say no. And the reason is this: If a voter can vote by hand-marked paper ballot and do that in person and participate in that democratic process, then they don't have to review their ballot. They have made those selections.

So the state is choosing to impose a burden on them by having them touch it on a touchscreen and then print it out and then have to go back and figure out, did the computer interpret my selections right? Did it print it right? That is a burden.

And, Your Honor, there is absolutely no argument from the state tailoring any --

THE COURT: Why is it a burden? I'm still -- I'm not impressed by that in some way. It is obviously -- you know, it seems it is important to do and perhaps have the right to do. And I understood your arguments about that.

But why is it a burden? It is not like the people have to go from one office to the next to get an identification card, which could be far more burdensome potentially and now seems to be authorized. It is quite different in that regard.

MR. CROSS: What I would say, Your Honor, is I guess two points. One, it is a burden because it is not something voters have to do or should have to do to cast their vote. Right? If they are voting by hand-marked paper ballot, that burden doesn't exist. They know that they are the ones that made the selections on that ballot.

The point at which the computer is now interpreting it and printing it for you, they have now injected an extra step in the process that a voter has to take to figure out, is my ballot -- does it reflect my selections? Let's put aside the QR code for a moment because we have covered that.

Even if it was being tabulated on the human readable portion, as Your Honor has pointed out and as the studies show -- the science shows, voters are really bad at being able to remember everything and find alterations.

Dr. Gilbert's own study showed that voters often -- if you change something on their ballot, they won't find it. They won't see it.

And so that is where the burden comes from is, if I filled out my ballot, those are my selections. I'm done, and I pass it off. If there is a computer that is doing that for me, I now have the burden of figuring out, is everything I selected right? Can I even discern that from the ballot? Does it have all the information I need? And am I going to be able to reliably do that, or am I going to miss somewhere along the

way?

And the balancing test gets to -- you could look at that either under, is it narrowly tailored to a compelling state interest? The answer is no. Or is it even rationally related to an important state interest? The answer again is no.

Let's be clear. They have not identified any state interest in the BMD system, and that is their burden. That is their obligation. They identify sort of these amorphous --

THE COURT: Well, the burden is on you to show -- it is on them to show that they have a compelling state interest or perhaps a lesser than compelling interest depending on the nature of your proof.

I mean -- and they have -- the reality is the State has -- is vested with the authority still to select the system. Now, if the system doesn't work, that is something else. But if the system has major faults that puts voting at risk, that is something else.

But I don't think that they have the burden to show in this -- as to this particular issue that you are raising about the question of voters reviewing their ballots -- I think they have -- it would have a strong interest though one would think still in making sure that people -- the voters are an extra form of auditing, and it supports the integrity of the system.

And that is why I started out with the questions I had in the beginning of the hearing.

All right. Let's move on.

MR. CROSS: Your Honor, on the state interest, a couple of brief points on this. One, they don't offer any evidence for any of the state interest. They just write it as lawyers. And that is not sufficient. They need to actually come forward with some evidence to prove up what they are saying.

THE COURT: Prove up what? That they have to show a -- you are saying they have to show they have a compelling and important interest in BMDs.

Doesn't that come after you have established that there is a constitutional violation then?

MR. CROSS: After we have established there is a burden and then you weigh them. Then the weighing determines whether there is a constitutional violation.

Interestingly, Your Honor, they are talking out of both sides of theirs mouths on this issue. And here is why. When we say you were concerned about the risk of this system affecting voters, they say, well, that is not a legitimate interest. That is literally the same interest they offer twice.

When you read what they wrote, this is their language. They say that -- they cite the *Weber v. Shelley*

case, and they point out that the state interest here is avoiding potential manipulation and errors associated with hand-marked paper ballots. They talk about how mechanical and human errors may thwart voter intent. That is the same thing that we have offered.

So it can't be, well, because it is forward looking, you are trying to protect against some future risk, that doesn't matter. They are offering the same thing. They are just offering it on a different side. And that is a fact dispute that has to get resolved.

The same with the second, Your Honor. They say they get to decide the manner of elections. Well, first of all, the Supreme Court has been clear that is not an unmitigated or unfettered right. As the court said in the *Republican Party of Connecticut* case, the power to regulate the time, place, and manner of elections does not justify the abridgment of fundamental rights such as the right to vote.

But here again they say they are entitled to take measures to reduce fraud and count votes. Okay. Well, that is interest. We're saying the same thing.

So it can't be that they get to say their interest gets to be mitigating some future risk and we don't get to say the same thing on the other side. In fairness, we both get to say that. But that gets to a fact dispute that Your Honor then has to resolve on the evidence to figure out which of those

burdens is greater and whether theirs is narrowly tailored to a compelling state interest or at least rationally related to an important state interest.

THE COURT: But voters themselves could decide to use absentee ballots. I mean, that is obviously the alternative.

MR. CROSS: It is, Your Honor. But they are asking you to plow new ground on that. When you look at the cases -- you can look at *Crawford* on the photo requirement. You can look at *Common Cause* on the photo requirement. In each of those cases, the voters could avoid the photo requirement by voting absentee. They don't have to vote in person.

Not one of those cases -- same with *Lee* looking at the other side on signature match. If you don't like signature match, go vote in person.

In not one of these cases when the courts were analyzing and assessing a burden that has been offered -- not once do they go and look and say, well, you've got an alternative and you can escape that. If that were the legal standard, then in both *Crawford* and *Common Cause*, they would not have engaged in this fact intensive exercise they do. They would have just said, we are done at the point that you can avoid a photo requirement by voting absentee.

That is the new law they are asking Your Honor to create. That is not the law. It has never been the law.

THE COURT: All right. Do you want to move on?

MR. CROSS: Yes.

THE COURT: Because it is 5:15 and I know you probably have other folks here who want to --

MR. CROSS: Yes, Your Honor.

THE COURT: I realize I took some time to sort of gather my thoughts after the last speaker.

MR. CROSS: So just quickly, Your Honor, I do think it is worth noting again, starting with your question -- I'm not going to spend much time on this. But, again, I do want to distinguish this from the other cases like *Tsao* and others. I'm not going to walk through it all.

(There was a brief pause in the proceedings.)

MR. CROSS: I would direct you that we have lots of evidence. For example, evidence showing the insecurity of the voting system here, the critical security vulnerabilities. I'm not going to walk through the breach.

I do want to pause just briefly on this slide. We have heard a number of times that we have to show a misuse of data. We have explained that that is not the right standard. It is not accurate.

But let's just accept that for a moment. Here we have, Your Honor -- this is from Mr. Skoglund. Dr. Halderman says the same. There was a misuse of data here. This wasn't just SullivanStrickler copying the data and handing it off.

The people who got that data have done all sorts of

things with it, including creating a virtual machine with it. It was then uploaded. The folks can tinker with.

But more importantly we know from what we have from Coffee County, even after the alterations that the state made through Mr. Persinger, we know that these people made alterations, abnormal and reckless changes to that particular software.

So there was a misuse of the data that was taken in a way that could affect future votes. And as Mr. Sterling testified, they have no idea the degree to which that could affect future votes and whether the system still works.

Your Honor, I do think it is worth noting just briefly the Coffee County breach is truly unprecedented. This is the entirety of -- what you have in front of you here, Your Honor, is literally the entirety of what the State has to say about Coffee County in their opening motion. That is it.

They cannot engage with us on the facts. Because as soon as they do, they lose or at the very least they lose this motion.

The idea that you can write a brief in this case and devote a handful of sentences, a single paragraph and say, you win on summary judgment is just -- does not at all comply with Rule 56.

Again, they acknowledge in their own motion they don't know whether the system works. This is their reply.

They quote us. We point out, defendants do not even know if the Coffee County breach led to an infection of Georgia's voting system or alterations that could disenfranchise voters.

One would hope that at this stage of the case they would say we do know, and here is our evidence that shows that this cannot happen, ergo we win. Their response is, it is not our burden to disprove the Curling plaintiffs' claims.

One, that is just an oversimplification of their burden in the case because we have shown the evidence that establishes this substantial risk. It then falls to them to refute that evidence. Their response is to say, you are right, we don't know, but it doesn't matter. And, of course, it does.

THE COURT: Well, in the context of *Muransky* and *Tsao*, which I recognize are merely data breach cases in the consumer context, which is still different than elections -- but in the context of the Coffee County breach, would that mean that still though that you -- that, in fact, it still remains plaintiffs' responsibility or burden to show that some votes were misused or were manipulated or that the data system was misused or that the equipment was misused?

I mean, we know that it was accessed. And I guess you could call it misuse from the perspective of data being taken off of it.

But beyond that, something that would endanger -- materially endanger the system at large.

MR. CROSS: Right, Your Honor. And, again, we don't have to show misuse. But let me respond to your question. We do have it because it is not just the software being taken.

It is Jeffrey Lenberg, for example, spending five straight days there, making whatever alterations and tests, and doing -- uploading software, anything that he was doing on that in the operational environment. Right? This wasn't in a lab where he could tinker with it and maybe have no impact on the system. He sat in the Coffee County EMS server room with direct access to the server, to the ICC, to the BMDs, to all the equipment in there, hours -- like five to eight hours a day from what I recall for five straight days. And that is way above *Tsao*. Right?

In *Tsao*, it was we have taken the data. We have left the operational system, and now we might do something with it. And the Court there still says, look, if you could have facts that show us a substantial risk of identity theft, that will pass the bar for standing and for injury in fact. You just don't have it here for the reasons we have talked about.

In *Muransky*, the same thing. The Court says, look, if there was a disclosure of information that could lead to identity theft, then we would get there. But here you have got a handful of credit card numbers and the facts made clear that that doesn't lead to substantial risk.

Here we have someone spending a week sitting in

there. And he is doing it after having gotten access to the software weeks earlier. So he had access to the software by which he could do all sorts of things, including design malware. Then come back and sit in the operational environment of the state, upload anything he wants, create a back door, do other things, and the State is telling you, we don't know if any of that was done. That is the opposite of *Tsao* and *Muransky*.

THE COURT: Well, is that because they say they don't know what the GBI has found? And I assume it seemed like the GBI was working on this.

Does that mean the case should be stayed until the GBI gives its report?

MR. CROSS: No, Your Honor. Because the state that -- the burden is on the parties in this case. Let's be clear. The Secretary of State told this Court over and over again for a period of months that they were investigating this.

First, they said they investigated it and publically claimed it didn't happen. Then they said we are investigating it. But then we learned that Mr. Persinger, who was retained in May of 2021, by the way, when they first learned that Doug Logan and Cyber Ninjas have been in that office -- his declaration says he's retained that same month. He does nothing. They don't have him do anything until we raised the Coffee County breach. Then he puts in his declaration he

didn't look for malware. He didn't look to see if the system was compromised at all.

They have the capability to do that. Fortalice could do that. Mr. Persinger presumably can do that. I think he said he could in his declarations.

They have made a deliberate decision not to look. And we can infer from that it is because they are terrified from what they will find. Again, that is so vastly different from *Muransky* and *Tsao* where the court said, if we take all your allegations as true, there is no risk of harm because we can tell this is not the type of data that will lead to an identity theft or can lead to harm and you have already taken mitigation measures. That is not this case. There are no mitigation measures. Not even with what CISA has mandated.

So I just would say, Your Honor, it is hard to imagine a more compelling case of where voters should not be susceptible to a voting system when the representative of the Secretary of State's office says we genuinely don't know if it still works. We genuinely don't know if these people have a back door into it. No, we don't wait, because it is on them to figure that out. The longer we wait, the worse the burden.

The last two points, Your Honor, just really briefly, You had two questions that I wanted to get to. One is adverse inferences.

(There was a brief pause in the proceedings.)

MR. CROSS: Adverse inferences. You asked about that, Your Honor. And I will just say I do think, as we've laid out in our brief, we are entitled to adverse inferences. And just to give you really quickly some specific examples, these are some of the questions we asked Mr. Chaney. Are you aware of anyone ever having compromised the EMS server in Coffee County? Fifth Amendment. Did they load any software on to it at all? Fifth Amendment. Did they alter any of the software or firmware on any of that equipment? Fifth Amendment. Did they upload any malware? Fifth Amendment. Did they upload anything to the EMS server that could have any impact on the elections in the State of Georgia? Fifth Amendment. Did they connect any devices to any election equipment in the Coffee County election office that could have an impact on elections in the State of Georgia? Fifth Amendment. Was it their intent to do that? Fifth Amendment.

He selectively invoked the Fifth Amendment, which is why the inference is powerful here. There were lots of questions where he did not invoke the Fifth. On those, he did.

THE COURT: But he is not a representative of the State.

MR. CROSS: He doesn't have to be, Your Honor. For Your Honor to draw the adverse inference, you can draw it from that. They have the ability to put on evidence to refute the inference. It is not an irrebuttable inference.

But Your Honor can and should draw that inference in our favor, particularly here under the Rule 56 standard where the Court is obligated to draw all inferences in our favor.

Lastly, EAC -- Your Honor asked about that. And I just wanted to say the reason why the EAC certification doesn't satisfy or doesn't get to the constitutional requirements is because that is not what the EAC does.

The EAC -- this is kind of how I think about it. If you bought a computer and walked into Best Buy and asked the Geek Squad to look at it and figure out whether it functions and operates, it turns on, all the applications work, and it looks kind of generally reliable, that is what EAC does. They are relying on a standard that was developed 18 years ago.

In fact, Your Honor may not know this. The DREs are still certified today by the EAC. They are still certified today.

But if you were to walk out of the Geek Squad and have a cybersecurity expert look at your computer or the Geek Squad will have told you, this is fine, you can use it, it does what it is generally supposed to do, the cybersecurity expert will look deeper and say, well, it turns out you have actually got a back door or malware or vulnerability and you don't want to use this computer.

That is the difference. The EAC is not doing the latter.

Did I answer all Your Honor's questions?

THE COURT: You did.

MR. CROSS: Thank you.

THE COURT: Mr. Brown?

MR. BROWN: Bruce Brown for the Coalition plaintiffs. Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. BROWN: Even without indulging in the presumptions that the Coalition plaintiffs as the nonmoving party are entitled, the evidence is persuasive that a severe burden in the right to vote is almost certain to occur.

Because of that, a number of things are true. Number 1, we have more than established the hard way of establishing standing that Mr. McGuire described. We have established the easy ways of doing standing running away, even without that.

What is also true is that we have come very close already to establishing that the BMDs in Dominion's system are unconstitutional under the *Burdick* balancing test.

Now, a couple of things that I would like to address very quickly is that it is very -- for our case to be -- I don't know what the severe burden was in the *Tsao* or the *Muransky* case. Those are standing cases.

On the merits here, we do not have to show disenfranchisement to be a burden, even a severe burden. It is

a sliding scale. How Your Honor, as a matter of fact when all the evidence is in, gauges the burden, whether it is the highest -- we believe it should be -- or just beneath that, will determine the justification that the State has to show to supply that.

We believe that the State's justifications will be totally absent because they are the same as ours. Everybody needs an accountable system. And that is what our argument is about is an accountable result, a result that people can have confidence in.

The plaintiffs are on the same side as the public in this case and the same side as the Government and the Secretary of State. We want accountable results that people can have confidence in, accountable results that are important now more than ever and in the future even more, particularly with the increasing threats presented by artificial intelligence and by cybersecurity and everything else.

It has become -- I fear that in a couple of months, if not one month, given the advancement in technology, the questions that we're looking at here are going to look quaint. I just hope they are not tragic. Because the risks that we have identified and proven are unlike the issues that have come up in that string cite of cases in the *Jacobson* court. This is a new case. This is a different case.

There is analogies to it in the other voting cases.

But this is new because we have proven a new and very serious threat that needs to be evaluated under the standards of those cases but in a new way. And that is what we have come for you to do.

Our view on the BMDs, although it is a new threat, there is a lot of existing wisdom that can be applied to what a BMD is or a BMD ballot is. A BMD ballot is hearsay. It is rank hearsay. The declarant is the voter, who is long gone, a formal choice gone with a push of a button. The BMD ballot is hearsay.

THE COURT: What makes it different than again the lever?

MR. BROWN: You could never get it into court.

THE COURT: You could never get what?

MR. BROWN: A ballot produced by a BMD into court because it is hearsay. The declarant is gone.

THE COURT: Well, you wouldn't get a lever -- the old lever system into court either.

MR. BROWN: Maybe not. Maybe not. But you could get a hand-marked paper ballot. And that is why when they say they want this particular result, no, it doesn't have to be hand-marked paper ballot maybe but it needs to be audited and it needs to be verifiable. And a hand-marked paper ballot does that. And it is what the State has already prescribed in their laws you should do if there is an emergency and if the BMD is

impossible or impractical. And they already use it. They already use hand-marked paper ballots. They use them for in-person voting. They use them for absentee voting.

They have got the scanners for them. The scanner need to be fixed. But they have the scanners for them. They have the EMS form. They have everything. All we are saying is don't use that screen, just let people write them out. It is such a -- look, artificial intelligence and these other very scary things present such difficult problems in other areas that I'm sure Your Honor is going to be confronted with soon.

Copyright law, patent law are going to be so difficult with all of these advances about how you solve these really difficult problems. This problem is so easy to solve that the failure to do so is manifestly unreasonable is what our position is. It is when you can make it so much better so easily. To refuse to do so --

THE COURT: Let me just say -- let's say I accept that proposition. But am I the one -- given where the law has gone, am I the one to do that or is it simply that this is legislative decision that they need -- that the State should -- in light of all the things you are saying should change it?

MR. BROWN: Shouldn't do it on summary judgment and we didn't move on summary judgment. But under the *Anderson v. Burdick*, that is -- the Supreme Court has said, to answer that, yes. We have a burden to show that there is a burden on the

right to vote that is outweighed -- but that is the cause of action.

If we were arguing for an *Anderson-Burdick* cause of action before those cases, then it would be a harder answer. But the Supreme Court has already said that. It said, and it is a sliding scale. And it can be even a minor burden. It has to be a burden, but it doesn't have to be a huge one.

And so -- and Congress has said -- under Rule 56 has already given you the authority to resolve factual disputes in only certain instances.

And so we're not -- you're not -- we don't think you're out on a limb. You would be if there was an *Anderson-Burdick*. But their argument would wipe those cases away in any sort of modern problem that has real consequences.

One argument that I did want to address in particular, Your Honor, is the -- and Mr. Cross did a very good job of sort of explaining how absentee -- you can't hold that this mode of election is beyond review just because you can do something else, just like with the photo ID.

I will call your attention to the case that we cite in the brief. It is by Judge Tjoflat. And it is really an eloquent restatement. And it is the -- *Bourgeois* is the name of the decision I think is the way you pronounce it. 387 F.3d, and the quotation that we're looking is at 1324.

But it is in the -- it is in -- it is not a voting

rights case. But it is a First Amendment case. But what Judge Tjoflat does is explain how malignant and bad it is for the state to justify one unconstitutional mode by saying you can do something else. He said, indeed, the very purpose of the unconstitutional conditions doctrine is to prevent the Government from suddenly pressuring citizens, whether purposely or inadvertently, into surrendering their rights.

So we believe that is one of their most repeated arguments that they have is that you can vote absentee. On the facts, Your Honor, we have also shown that voting absentee -- and you have noted this in your opinions -- that there are all sorts of problems with voting absentee.

But there is one fact that will probably make our top ten when we give it to you on Friday. And that is what counties are doing, Judge -- the counties are taking hand-marked paper ballots that come in in the mail. And if they are torn when the automatic thing opens them, they put those into the BMD. They fill out the BMD and let the BMD do it. So you can't -- it is not an alternative.

And we don't know -- and one of your questions was how prevalent is that. We don't know. They have never responded to that evidence or rebutted it significantly.

And so we think that as a matter of law -- it is wrong as a matter of constitutional law to say, just because you can do absentee voting, that it is okay to have an

unreliable in-person voting. But in any event, absentee voting has its own problems running away.

We have three claims I do want to mention. We have three claims. The State did not move for summary judgment on those three claims, period. I could not quite understand what Mr. Miller was saying about it today. He put up a slide about our Poll Pad claims -- that discuss the Poll Pad claims. That is not in their brief.

But you know about our scanner setting claim. That came back from the Eleventh Circuit. That is clearly in this case. They didn't move for summary judgment on that. They have not even mentioned it.

In terms of the ballot privacy claims --

THE COURT: But wasn't the scanner setting claim actually set forth in the complaint? I mean, it was -- I viewed it originally as sort of part of the -- almost the -- in a more organic way -- but I'm not sure that that was correct -- as related to the voting but -- and the absentee -- and the absentee ballots, which were the alternative.

MR. BROWN: In terms of why it is in the complaint is that our complaint challenges the Dominion voting system, not the BMD. And they -- the State defendants say that -- they say it wrong so many times they get us to saying it wrong, to their credit.

But we challenged in this -- this is what Your Honor

cited also in keeping this in the case. To the first supplemental complaint Paragraph 67 and 70, we challenge the EMS, e-pollbooks, BMDs, and the scanners. It has always been in our case. They keep on saying that it is not in the case. But they don't ever explain it. They didn't move on it.

It went all the way to the Eleventh Circuit and back. It is close to a preliminary injunction. That case -- that is still in the case.

In terms of the Poll Pads, Your Honor has addressed that, I think, three or four different times already. The last time they raised this -- this is -- I think they are probably going to complain about the amount of our attorneys' fees that we get awarded. But the last time it was their fourth time. This is the fifth time they are saying the Poll Pads aren't in this case. The fourth time they made that argument, you called their argument fantastical because it was so clearly within the case.

And that is their only argument. Their only argument for the Poll Pad claims or the scanner claims or the ballot secrecy claims is that it is not in the case. And that is just false. On the -- so that covers the scanner settings.

And you will recall, Your Honor, the scanner settings was -- Ms. Dufort testified about the mistakes that the scanners were making -- egregious mistakes, actual disenfranchisement. She -- in our papers, same problem again.

So the same scanner problem that she testified about at the trial in the PI are reappearing again. So that came --

THE COURT: Didn't the State though adjust some of the settings?

MR. BROWN: It did. This is post those adjustments. So it is still happening. And so that needs to be tried if we don't get preliminary injunctive relief. Or either way, we would be entitled to have a trial on that.

Poll Pads I have already mentioned. On the Poll Pads on the evidence, we have copious evidence that there continues to be problems with the Poll Pads. So the burden on the right to vote has increased.

It is easier to fix now because they have a port -- if they want to do this, they could do it. They don't need to print it out. They could just use a jump drive. Because the newer versions, they can use a jump drive to put them in.

It is also more vulnerable now than it was before because they are now connected to the internet. They were very proud of the fact that the Poll Pads were never connected to the internet. Well, Misty Hampton and -- down in Coffee County testified that, oh, yeah, we watch Netflix on our Poll Pads, which I think means it is connected to the internet.

So they are even more dangerous. They continually have problems. And we're entitled to -- and there is no argument from the State defendants that they are entitled to

summary judgment on that. There is just none. So that is the Poll Pads.

The third claim -- the third and fourth claims are the secrecy claims. We briefed that extensively. We explain in the brief how ballot secrecy is still in the case. They don't say why it is not. They don't say why motion for summary judgment should be granted on it. There is just no argument about it. They just say, very strangely, that you've dismissed it. And you haven't.

You discuss it in the motion to dismiss and in the preliminary injunction. So those claims are still alive.

Finally, Your Honor -- now, they may come up in the rebuttal and say some other argument. It is not briefed. And they didn't move on those four separate claims.

On mootness, to be brief and also to be precise, I would like to direct the Court to what we say about mootness in our response to the statement of material fact. I think it is important because this is a joint statement by both Curling and Coalition as to the mootness.

It is also important because drawing the line between what is moot and not moot is technical and important. And we have already -- we have set it forth. So our joint response, Document 1638, docket page at the top 28, Paragraph 34.

THE COURT: Page 28?

MR. BROWN: It is -- yeah, Page 28. And then it is

Paragraph 34. We explain which claims we won on and that are no longer in the case and which claims -- and which issues are not moot.

I don't believe there is a substantial light between the State and the defendants on this issue. But this is a little bit more precise on it.

Your Honor, just one other point on the ballot secrecy. Although this goes to standing, ballot secrecy is a -- is a powerful fact for injury under Article III because the State has made it a crime for a voter to view another voter's screen.

It is almost impossible to avoid doing that. So to vote in person, you have to risk being charged with a felony. That is a burden. That is clearly a burden that will give you standing, standing to get into court to try to get relief that would redress that, which is getting rid of the BMDs.

I note that the Coalition plaintiffs allege this in their separate statement of material facts. But in addition, we point out that the Curling -- one of the Curling plaintiffs, Mr. Schoenberg, also alleges that.

So on the Curling side, there is also very tangible and specific injuries that the BMD causes that would give the Curling plaintiffs standing.

Thank you, Your Honor.

THE COURT: Thank you.

MR. MILLER: Your Honor, I'll be very brief. But I will talk a little more deliberately before I have something thrown at me by Ms. Welch.

THE COURT: She wouldn't do that.

MR. MILLER: Just to address a couple of points -- and I wouldn't blame her for that either, by the way.

Just to address a couple of quick points pointed out there. Starting first with this discussion about the pollbook theft that was in the news here over the last couple of days, two quick issues. We have heard a lot about -- let me get this on the -- well, I don't need it at the moment.

We've heard a lot about how various allegations are purportedly not in the record, not in the pleadings, not in the summary judgment. There is nothing about this pollbook theft in Dekalb County. But I also want to be very pointed on this because enjoining the BMD system -- the Dominion BMD system will not eliminate the risk of a criminal stealing an iPad out of an elections warehouse. It just will not.

Under any system, there is going to be some form of laptop or computer to check in a voter. There is going to be some form of laptop or computer or scanner that is a computer that tabulates the votes, that contains the voter registration system. It will always be there in some form.

I want to touch briefly on one item, which was this passage in *Jacobson* that Mr. Cross touched on.

I was trying to make this full screen, if I can -- there we go.

The point here is out of these -- out of these five items, as Your Honor pointed out, the statute does not make it more difficult to vote. This is not about going to the DMV and getting a photo ID. This is not about having to do some additional step in that regard.

I think I'm losing my connection.

This is also not about choosing a candidate of your choice. *Burdick* is about write-in voting. There is no allegation that you cannot vote for who you want to. It is an allegation that, due to some potential chain of events involving the actions of a third party intervening with the Dominion BMD system, that the vote would be altered or manipulated, which really puts it into that fifth category, which is the point.

I won't spend a ton of time on these others. I think they just plainly don't apply here. But our point with this passage is that, of these types of claims, the only type of claim that is a colorable First and Fourteenth Amendment burden on the right to vote is one that alleges, you know, the risk of votes being uncounted or improperly counted.

And so that is the point as to when we look at each of these burdens which one of those fit that category. For example, the auditability does not fit that category. Nothing

in the audits is about tabulating the votes. It is about a check on the back end.

So just briefly on that point. One additional item. Mr. Cross pointed out that I had stated there was no vote switching malware. That is not precisely what I had stated. What I had stated is that there is no malicious code -- vote-stealing malicious code that is both adaptable such that it can work on multiple different elections nor self-propagating. That comes from Dr. Appel's deposition testimony. Dr. Appel himself, I mean, is -- and the plaintiffs will tell you. He is a preeminent expert in the field of election security. He has never seen it.

And that goes to the point of both the -- you know, this concept -- and I won't dig into the mootness aspect because I think we addressed as to the difference between mootness of a claim and where factual matters intervene. But that factor goes into the factual matter of this question of can something snake its way from the old DRE system to the BMD system. Not if there is not adaptable or self-propagating malware that somehow knew what the system was going to be.

THE COURT: Couldn't, in fact, be the malware that -- whatever was done that I don't know about when whoever was working in the Coffee County office and now they have posted it and they have a certain group of people and perhaps bunches of other people who are not identified to us who could be working

on it -- why isn't that a true threat?

MR. MILLER: So, first of all, that somebody could be working on it isn't -- it is not necessarily a material fact at issue. The material fact at issue is whether it has been done or it is certainly impending to be done.

THE COURT: Right. And the State has not answered that -- I mean, they -- I think there has been significant colorable evidence. And I think that -- I understand that the State's vesting this in the GBI to investigate.

But it has been a significant period of time. And so you are asking me to rule on this without -- for the State when all of the information is within the State's access.

And I don't know -- I mean, I'm not -- I'm not complaining. I'm just saying it is a problem.

MR. MILLER: To be clear, Your Honor, all the information is not within the State defendants' access. The GBI is a separate state agency.

THE COURT: I understand that.

MR. MILLER: I don't represent the GBI.

THE COURT: I understand that. And the Secretary of State's office asked for the GBI to investigate. So it is not that the GBI wasn't capable independently to do that. But that is not what happened here.

MR. MILLER: I understand your point on this. But also the corollary to this is that it is plaintiffs' burden to

show that. They have had this information and system -- I mean, heck, we had probably a dozen depositions of these various people that went in there. We've got the forensic images of, you know, what they did. And there is nothing in there that they did that anybody testified to or otherwise --

THE COURT: What do I do with the testimony that essentially one of the critical people took the Fifth?

MR. MILLER: So, Your Honor, I would point the Court to *Coquina Investments v. TD Bank, North America*. And the citation for that is 760 F.3d 1300.

And what that case is about is in the context of this adverse inference for a Fifth Amendment -- invocation of a Fifth Amendment privilege where it is a nonparty and the inference sought to be drawn is against a party.

And what the Eleventh Circuit applied in that case is it adopted a case-by-case analysis that considered four factors. One, whether a relationship exists between the -- excuse me. I'm sorry. I got tripped up -- whether a relationship exists between the party against whom the inference is being drawn and the nonparty invoking the privilege and what the type of relationship that is.

There is no relationship between the State defendants and Mr. Chaney.

MR. CROSS: Sorry to interrupt. Do we have a copy of this case? I think this is new.

MR. MILLER: Well, I mean, I have been trying to figure out what kind of adverse inference we're drawing for a little while now. But --

MR. CROSS: Well, you didn't --

THE COURT: All right. Listen, you have a computer there. I mean, you can always -- I'll let you -- if you want to submit two pages afterwards about *Coquina*, that is fine.

MR. CROSS: They didn't respond to this in their reply.

THE COURT: All right. In oral argument, all sorts of things happen.

So go ahead.

MR. MILLER: And so the second factor at issue here is whether the defendants have control over the individual that is invoking the Fifth Amendment privilege or even had control. No circumstance of that matter here. Whether there is an alignment of interests in the outcome of this litigation, there is no alignment of interest. In fact, if there is any alignment of interest, it is these same individuals who allowed the folks searching for Hugo Chavez's malware on the Dominion BMD system -- they are going to want the Dominion BMDs gone. If anything, it is a complete opposite interest.

And then finally as to whether the nonparty witness has a material role in the litigation. And that is simply not the case here.

Maybe at most, they meet the fourth factor. But even with all of these factors, there also, under *Coquina*, has to be some form of corroborating evidence as to the Fifth Amendment invocation.

So the example here would be if Mr. Chaney or Ms. Latham or Mr. Lenberg or any of these other characters invoked a Fifth Amendment privilege as to whether I entered the building or whether -- I think one of the lines of questions frequently were whether Ms. Latham held the door open and invited people in.

There is corroborating evidence to those. It is the security images, the footage. For an adverse inference to be drawn that goes to whether vote-stealing manipulating malware was installed on the devices is a completely different story. And there is zero corroborating evidence for that. In fact, there is a complete absence of corroborating evidence for that. So that is the answer -- the Fifth Amendment privilege invocation.

And as to Coffee County more generally, I just want to point out, Your Honor, that when a local election board refuses to follow State Election Board rules and regulations and state law, that, again, is not an action that is directly traceable to something of the State defendants.

It is a similar situation that was discussed with respect to the pollbooks. If a local election official is not

using the paper pollbook backup that is required, that is not some injury that comes back to the State defendants.

So that -- and, finally, Your Honor, I'll note that there is not a plaintiff here from Coffee County. I realize the allegation is something more, that somehow it is going to snake its way from Coffee County back to the central system.

But at least with respect to the concrete allegations, there is nobody from Coffee County vindicating their interest here at this point. I think --

THE COURT: I think that sort of diminishes the problem about if it is posted on the internet, the software, in any manipulated form and other actors can use it and potentially -- and use it in nefarious ways.

MR. MILLER: And I want to be clear, Your Honor, that the State defendants are not, you know, suggesting that there is no problem, there is nothing wrong with the scenario.

THE COURT: I understand that.

MR. MILLER: But it is a -- you know, what is the actual impact of that -- again, the real irony is these people were looking for that malware. They didn't find it. The plaintiffs came in and looked at the system, again looking for that malware presumably. Although at some point, I believe Dr. Halderman testified he wasn't asked to look for the malware. Not entirely sure why.

But, nonetheless, plaintiffs came in and looked at

the forensic images. They didn't find it. What was done in Coffee County is the same thing that would have been done on a hand-marked paper ballot with unauthorized access. They ran a bunch of ballots through the scanner. And Ms. Latham brought her scanner from the church and ran ballots through it.

THE COURT: So has the GBI or the Secretary of State's office done a full examination of the software that was posted on the internet? And I realize with some access requirements.

MR. MILLER: Your Honor, with respect to a full examination, I can't speak to that, sitting here today. There is nothing in the record indicating that. There is also nothing in the record that indicates a full examination of the plaintiffs that showed something different.

I would also point out to the Court, Your Honor, that this is somewhat ironic in that Your Honor will recall the discussion over the GEMS database and whether that needed to be subject to a protective order.

And a certain group of the plaintiffs insisted that it didn't need to be subject to a protective order whatsoever. And now we're in the flip side scenario here. So --

THE COURT: All right.

MR. MILLER: But, Your Honor, just a couple of quick points.

With respect to the Poll Pads, the issue here is that

the State defendants move for summary judgment on all items in the complaint. We don't believe that the Poll Pad allegation is a part of the complaint.

And if we look at the allegations here that I just wanted to pull up briefly, these are about how the BMDs themselves allegedly burden or infringe on the fundamental right to vote. And it has got nothing about paper pollbooks, pollbook backups, nor the Poll Pad check-in systems themselves.

With respect to the ballot secrecy issue, I will concede that is at least a part of the Coalition plaintiffs' equal protection claim. It is included therein.

But the bottom line with respect to ballot secrecy, Your Honor, is that the gravamen of the issue is that this is a state law matter. And Judge Jones in *Fair Fight* in a preliminary injunction order filed there found the same thing on an interpretation of state law.

Finally, Your Honor, I want to quickly address one or two brief points. I think there was a statement made earlier with respect to the burden and the severity of the burden and what the State's right is to regulate elections.

To be clear, the State does, in fact, have an unfettered right to regulate elections pursuant to their constitutionally granted authority in Article I. That is constricted by the text in that provision which says Congress may regulate the regulations for senators and representatives.

And it is also restricted to the extent that a severe burden on the right to vote is imposed or something more than a minimal burden at the very least.

Because in that instance, the State's reasonable and nondiscriminatory restrictions are subject to no evidentiary showing on behalf of the State whatsoever. They will survive the *Anderson-Burdick* test.

Finally, I just want to reiterate one point that I made briefly in the opening argument. I think that it became more acutely at issue here after the Coalition plaintiffs' claims is that at bottom the -- what is the triable issue here?

And the Coalition plaintiffs and the Curling plaintiffs too have a lot of ideas about how to administer elections. But the proper audience for those ideas about how to administer elections is a few blocks away under the gold dome.

It is not simply because it is a good idea. That does not amount to a constitutional right, which can be vindicated within the power of the Court.

THE COURT: Thank you very much.

MR. MILLER: Thank you.

THE COURT: Fulton County's representative has been very spare and efficient in his remarks.

Was there anything you needed to say?

MR. LOWMAN: Your Honor, in light of your earlier

question to the plaintiffs and in light of the argument here today, it is clear that we will rest on our briefs and that they will speak for themselves. And I think they show why we -- and I think you understand why we are not a proper party to this case.

THE COURT: Thank you.

All right. Well, it has obviously been a very long argument. We aren't trying to pretend we are living in another era with Clarence Darrow with great advocacy that goes on forever. And -- but it has been very helpful. And, of course, the reality is hearings are necessary sometimes to get the judge absolutely focused and understanding some issues that may have eluded her or him.

And I greatly appreciate all the preparation that went into this.

MR. CROSS: Your Honor, could I ask one quick thing?

THE COURT: Yes.

MR. CROSS: One of the questions you had in your written questions about the admissibility of the MITRE report -- could Ms. Middleton have like two minutes on that?

THE COURT: Yes, she can.

MR. CROSS: Thank you.

THE COURT: I know she is all ready for it. But, you know, if she does do this, I do have to allow the State to respond.

MR. CROSS: Yes, of course. Okay.

THE COURT: Thank you for your patience.

MS. MIDDLETON: Good evening, Your Honor. Caroline Middleton for the Curling plaintiffs.

The MITRE report in this case is admissible on several grounds. The plaintiffs objected to the MITRE report in the summary judgment filing. State defendants did not respond to that objection at all in their reply filings, much less rebut it. That was their opportunity to do so. Any argument now is untimely and waived.

The Court should also not consider the MITRE report because it is immaterial. It is not cited, and defendants do not rely on it in their briefs.

State defendants' attempt to now offer the MITRE report into evidence as an expert report is extremely untimely. Local Rule 26.2(c) states, any party who desires to use the testimony of an expert witness shall designate the expert sufficiently early in the discovery period to permit the opposing party the opportunity to depose the expert, unless the failure to comply was justified.

Here in this case, the parties agreed and the Court approved expert discovery deadlines. State defendants made no mention of MITRE and produced no report from MITRE by those deadlines.

This Court previously emphasized the importance of

the expert discovery deadlines by excluding a report from plaintiffs that it found to be untimely. In January 2022, State defendants objected to one of plaintiffs' experts as untimely and this Court excluded it.

In keeping with State defendants' position and the Court's corresponding ruling, State defendants' disclosure of MITRE as an expert or introduction of the MITRE report is especially untimely now. And it would be manifestly unfair and highly prejudicial to plaintiffs for the Court to consider the MITRE report but not Dr. Buell's report.

As of today, State defendants have not disclosed MITRE or anyone from MITRE as an expert. We don't even know who specifically prepared the MITRE report, how many individuals prepared it, what their training and qualifications was to constitute being an expert, what specific expertise is being offered for any such individuals, what all they considered or relied upon for that report, or any of the information that parties are required to disclose under Rule 26 with an expert report.

That failure, which has persisted since the report was first disclosed, is not justified. State defendants have offered no justification for waiting until long after the expert discovery deadlines to put forward the MITRE report as expert testimony. They had ample opportunity to do so within the schedule ordered by the Court, and they chose not to.

Moreover, while State defendants received the MITRE report by at least May of 2022, they sat on it for four months until September of 2022 to provide a copy to plaintiffs and file it on the docket. That untimely disclosure is unjustified and highly prejudicial to the plaintiffs.

The Court should also not consider the MITRE report because it is hearsay. State defendants claim that MITRE provided their findings of an independent expert technical review. And expert reports are generally inadmissible hearsay.

While the Court has some way to consider hearsay at the summary judgment phase, such as expert reports, it can only do so where it concludes that the statements will come in at trial through admissible evidence. Here, no such conclusion would be appropriate.

Plaintiffs have had no opportunity to cross-examine MITRE or the other court declarants whose statements are contained in it. We don't even know who wrote it or how many individuals wrote it or who State defendants would offer as an expert witness or which witnesses would testify.

And also the unsigned MITRE report does not fall into any of the hearsay exceptions. It does not qualify as a business record given State defendants' statement that it is an expert report. It is not a -- it is not a public record. Unlike CISA, for example, MITRE is not a public agency. And the MITRE report does not fall within the residual hearsay

exception because it lacks all indicia of reliability and because of the bias of Dominion in directing the report's production.

The MITRE report quotes extensively from the Halderman report despite this Court's protective order prohibiting any disclosure of Dr. Halderman's reports to third parties, such as MITRE.

It provides a critically incomplete and misleading picture of the facts, as well as Dr. Halderman's analyses and findings, which CISA validated. For example, a foundational assumption underlying the report and the opinions offered in it is that nobody can gain access -- unauthorized access to Georgia's voting system. But we know from Coffee County that is not true. That objectively wrong assumption reveals a lack of rigor and reliability with which the MITRE report was prepared.

As Mr. Miller mentioned, we just learned yesterday of another breach of Georgia's voting system relating to the Poll Pads.

The MITRE report also wrongly assumes for its opinions that the human readable text of the BMD ballots is what gets tabulated and counted for elections. The MITRE report also lacks reliability because it was created for Dominion's commercial purposes.

THE COURT: All right. I sort of said yes, we could

have a sum, but how much longer are we going?

MS. MIDDLETON: I have one minute.

THE COURT: I think I have heard enough. Thank you. I appreciate -- if you have something in your last minute that you want to say --

MS. MIDDLETON: I was going to touch on discovery. I am done with hearsay.

THE COURT: I understand you would want discovery.

MS. MIDDLETON: Okay, Your Honor. Thank you for the opportunity.

THE COURT: If I were to allow it, you want to be able to conduct a discovery deposition of the author or authors?

MS. MIDDLETON: Yes.

THE COURT: Is that right?

MS. MIDDLETON: Yes. The plaintiffs have not had an opportunity for discovery, but it would be highly prejudicial to allow it at this time given the stage -- this very late stage of the case.

THE COURT: All right. And did the State rely on the MITRE report in its responses to the --

MS. MIDDLETON: It did not, Your Honor. So our position is that that was an opportunity to do so. And because they didn't, that that is waived.

THE COURT: All right. Thank you very much.

MS. MIDDLETON: Thank you, Your Honor.

MR. MILLER: Your Honor, I'll just very briefly respond.

State defendants' position, frankly, is that both the CISA report and the MITRE report are not material facts at issue right now.

THE COURT: Well, let's -- we're not going to go back to the --

MR. MILLER: I'm not going to go back --

THE COURT: I'm just going to say. You got me to exclude Dr. Buell's report. And so it would be very hard for me to consider allowing the MITRE report.

MR. MILLER: I understand, Your Honor.

The only point to say it wasn't a material fact is simply that, first of all, the State did not hire MITRE. The State did not engage MITRE. That was a Dominion response.

THE COURT: I understand that.

MR. MILLER: As the Court indicated with respect to the CISA report -- as I recall, we raised it in a discovery conference as to whether the CISA report was going to be considered at trial or on the merits. And as we understood it, the CISA report was a factual development. Likewise here, the State's position is that MITRE is a factual development.

We don't think either matter in the context of this motion. But the State's position is only if one comes in the

other does too. And with respect to Your Honor's --

THE COURT: I don't think that the -- they are in different positions though. There was an official responsibility in the federal law for CISA's reports. It doesn't mean that they are 100 percent accurate. You can challenge anything there but -- especially if this -- you know, at the juncture that this was created, if it was something that you wanted to pursue, I think it needed to be raised right away.

MR. MILLER: Your Honor, to that point on the timing, this was a publicly announced finding in May of 2022.

THE COURT: But was it publicly announced in this case? I remember the MITRE case -- that it came out. But it doesn't mean that it was clear that the State defendants wanted to use it.

MR. MILLER: We never made a formal Rule 26 disclosure, no, Your Honor.

THE COURT: That is what I'm saying.

MR. MILLER: We never did.

THE COURT: I'm just going to say it is not likely to be authorized.

MR. MILLER: Okay. And I will make one last point as to Your Honor's prior ruling as to Dr. Buell, which was that the Court ruled that Dr. Buell could not come in because he had been absent for years but that Dr. Stark could incorporate

Dr. Buell's report.

THE COURT: I remember. I remember. But you had every opportunity, didn't you, to question the doctor about his amended report or were you foreclosed from doing that?

MR. MILLER: We only got that opportunity probably on -- I think that was in the fall of 20 -- forgive me. The case merges together a little bit.

THE COURT: We had a lot of trouble with discovery, I recognize. But you did get that opportunity.

MR. MILLER: Correct. To be fair, we were still taking depositions of Dr. Halderman in January a week before we filed the motion.

But with that, Your Honor, I will sit down.

THE COURT: Thank you very much.

MR. CROSS: Thank you, Your Honor.

THE COURT: Thank you, everybody. Well, again, if you are going to get this -- if you need more than Friday, just agree on when it is going to be sent.

Thank you for all the preparation you did for this. I think that I want to -- State counsel sent us an electronic version of the -- didn't you?

MR. TYSON: Yes, Your Honor.

THE COURT: If we could get an electronic version of Curling plaintiffs' show-and-tell also.

Anything with my team over there?

All right. Thank you very much. And it was very helpful. I want to thank also the very interested audience for your absolutely extraordinary attention and quiet though and lack of oohs and ahhs. But, of course, oral argument is not evidence.

Good to see you-all. I hope everyone stays well. And you have given us a lot to work on. Thank you.

(The proceedings were thereby concluded at 6:18 PM.)

C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 190 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 4th day of May, 2023.

Shannon R. Welch

SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT